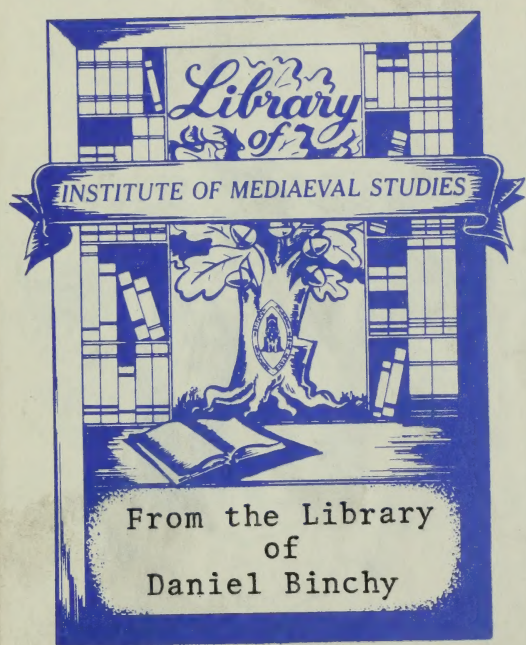




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AN INTRODUCTION  
TO THE STUDY OF  
JUSTINIAN'S DIGEST

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AN INTRODUCTION  
TO THE STUDY OF  
JUSTINIAN'S DIGEST

CONTAINING AN ACCOUNT OF ITS COMPOSITION AND  
OF THE JURISTS USED OR REFERRED TO THEREIN

TOGETHER WITH  
A FULL COMMENTARY ON ONE TITLE  
(DE USUFRUCTU)

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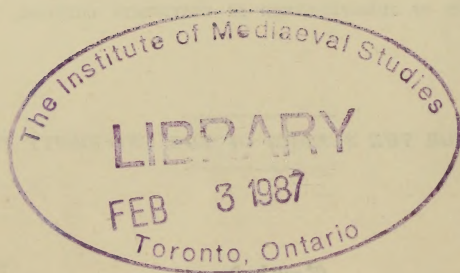
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AN INTRODUCTION  
TO THE STUDY OF  
JUSTINIAN'S DIGEST

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„Und was darfs viel Worte? das kaiserliche Recht nach welchem das Römische Reich noch heutiges Tags geregelt wird, ist ja Nichts anders denn hebräische Weisheit, welches die Römer, ehe denn Roma von Christo gehört hat, gesetzt und geordnet haben. Und ich acht wohl wann igt alle Juristen in einen Kuchen gebacken und alle Weisen in einen Trant gebraut würden, sie sollten nicht allein die Sachen und Handel unangefasset lassen, sondern auch nicht so wohl davon reden noch denken können. Denn solche Leute haben sich in großen Händeln müssen üben, sind darzu mit großer Vernunft und Verstand begabet gewesen. Summa sie haben gelebt und werden nicht mehr leben, die solche Weisheit im weltlichen Regiment gehabt haben.“ LUTHER<sup>1</sup> (*Opp. Altenb. T. 6. f. 203 sq. Ien. 6. p. 156*).

“Dixi saepius post scripta geometrarum nihil extare quod ui ac subtilitate eum Romanorum Iureconsultorum scriptis comparari possit, tantum nervi inest, tantum profunditatis.” LEIBNITZ<sup>1</sup> (*Op. 4, 3. 267*).

Unter ungünstigen Verhältnissen wurden Justinians Sammlungen unternommen, und dennoch geschah die Auswahl mit so viel Sinn und Liebe, daß wir nach Dreizehnhundert Jahren fast bloß aus diesen Büchern, und bei großen Lücken unsrer historischen Kenntniß, den Geist des Römischen Rechts begreifen können.... Die eigenen Constitutionen Justinians sind allerdings von verschiedenem Werthe, aber ein großer Theil derselben verdient das Lob der vollständigen Einsicht und Zweckmäßigkeit, und Vieles, was uns als Verunstaltung des alten Rechts erscheint, ist nur der verständige Ausdruck der Aenderungen, welche ganz von selbst, und ohne Zuthun eines Gesetzgebers, eingetreten waren. SAVIGNY (*Gesch. I. § 5*).

“With all their errors and imperfections, the Pandects are the greatest repository of sound legal principles applied to the private rights and business of mankind that has ever appeared in any age or nation.” CHANCELLOR KENT (*Comm. i. p. 541*).

“Hoc non ignoro ueram utilitatem libri pendere ab uniuersa horum studiorum condicione, maxime a felici iuris prudentiae litterarumque Latinarum communione, quae hodie iacet, nec iuri magis operam dant Latine docti quam iurisprudentes Latine sciunt. sunt qui dum huic meae operae fauent putant fieri posse ut studia reuirescant: nec desperandum est. uideant qui hodie iuri operam dant adolescentes ingenui: apud eos enim stat, utrum perduratura sit ars iuris nobilis et liberalis an in artificium sordidum degeneratura. ius Romanum creatum ingenio populi ad id ipsum nati, perpolitum decursu illo mirabili per uiginti saecula nationesque quae fuerunt quaeque sunt omnium principes, tamquam nobile aurum identidem decoctum splendet hodie splendore non imminuto aetate, sed adueto: et ut causarum patroni idonei iudicesque sagaces et religiosi etiam eo non adhibito institui possint, tamen ut studium efficiatur liberali homine dignum, id est eo qui hoc intellexit neminem plene uiuere diem praesentem nisi memorem dierum praeteritorum, opus est iure Romano, coniuncto cum ipsorum populorum tam Romani quam nostri creatione et formatione, uitae communi autem neque ita applicato ut animus adolescentis a libero motu statim in sordium eius uincula abripiatur neque ita ab ea alieno ut ex tirocinio ad arma difficilis transitus sit.” TH. MOMMSEN (*Praef. ad Digest. p. lxxx*).

<sup>1</sup> These two passages are given as quoted by Rudorff, *Gesch. i. p. 364*.

## P R E F A C E.

It is not unusual for students who have read the Institutes of Gaius and Justinian to proceed to the Digest. But the Digest is not easy. Neither the arrangement nor the method nor in some respects the phraseology is the same as that of the Institutes, and whatever title is taken up seems to presume a knowledge of a good many other titles. Yet, so far as I am aware, there is no edition of any part of it, at least in modern times, which furnishes help of the same kind as that, which is expected and given in many editions of classical authors. The present book is an attempt in some degree to supply this want.

The first part gives an account of the composition of the Digest and a brief notice of each of the jurists, both those from whose writings the Digest has been compiled and those who are cited or referred to in it. Some information of this kind is given in Histories and Institutional treatises on Roman law, but neither the order of the titles nor the order of the extracts seems to me treated satisfactorily. On the latter point no doubt everyone mentions Bluhme's discovery, but I am not aware of any exposition of it, except Bluhme's own, going into sufficient detail to shew its importance in the practical study and interpretation of the Digest. Further, I have thought it well to shew clearly by juxtaposition of some extracts with the originals, what the character of Tribonian's revision was.

The account of the Jurists is fuller than is found in general histories of Roman law. That this account is after all in



many cases very meagre, is due, mainly at least, to the want of trustworthy materials. I have refrained here and elsewhere from giving reins to imagination, and have endeavoured to let my readers see what may fairly be treated as known and what is matter of inference and conjecture.

One title fully explained seemed to me more likely to introduce a student to the intelligent study of the Digest than a longer portion less thoroughly treated. Accident determined the selection of the title *de usufructu*, but I have seen no reason for regretting the choice. There is much in the doctrine of usufruct which closely resembles our law of life interests, but there is also much which is specially Roman; and, as will be seen, a good many other parts of the law come naturally into notice in dealing with this. It is also not a little advantage that the corresponding title of the *Basilica* is one of those which have been edited by Zachariä von Lingenthal, with the Byzantine comments conveniently arranged. The Vatican Fragments contain a number of extracts on Usufruct, which furnish important comparisons with the Digest.

The text of the title *de usufructu* is that of Mommsen, with a few conjectural alterations. Whenever it deviates in any matter of moment from the Florentine text (i.e. represents neither that of the original copyist nor of the corrector) the fact is noted at the foot of the page. The arrangement of the text is my own.

My notes it will be seen are legal, philological, and antiquarian. They are of course much longer and more numerous than would properly accompany an edition of the Digest or of a large part of it. It seemed desirable to explain the meaning of a word or expression, not merely so far as the particular passage in question was concerned, but also as the student might find it in other parts of the Digest. A brief summary

of the law on many matters has been given, partly to remind the student of its relation to the particular question in hand, and partly because what may be already familiar to him from the Institutes will be found to assume a somewhat different aspect under different treatment.

Having had no predecessors in this particular field of annotation I have no special obligations to acknowledge here. Throughout the book I have tried to take my information from the original sources, and to depend on others only when the matter in question was large in itself and not closely connected with my subject. Whenever I have made any distinctive use of modern writers, or have thought the reader might like a fuller or different statement, I have given the requisite reference.

But a vast general debt I am anxious to proclaim. No one who cares for Roman law and philology can fail to feel the heartiest gratitude to the noble school of workers and writers, of whom as jurists, historians and philologists the leaders and types in their respective generations and lines are Savigny and Mommsen.

I have to express my thanks to the Syndics of the University Press for undertaking the publication of this book ; and to the Rev. Joseph B. Mayor, Editor of Cicero's *de Natura Deorum*, for having kindly read and criticised some of the proof sheets.

Corrections will be welcome. One who writes on subjects of this nature, without the assistance and check of colleagues or pupils, and with the resources of a private library only, stands especially in need of criticism from his readers.

H. J. ROBY.

WOOD HILL, PENDLETON,  
May 1884.

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Page xxii, line 14 from bottom, for *Theodosian* read *Theodosius*.

„ xxxv, line 18 from bottom, for vi read v.

„ cxvii, line 12 from top, for 'conspiracy' read 'auspices'.

„ 20, Add marginal note to l 48

*'Heir repairs without direction'.*

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## PART I.



## CHAPTER I.

### INTRODUCTORY.

WHEN Uprauda the Slave or Goth, reigning under the name of Justinian, essayed the reformation of the laws of Rome and accomplished it in seven years, he undertook and performed a task which, in point of difficulty and usefulness, is not undeserving even of the highflown praise which he has himself bestowed upon it. It is remarkable that the nephew of a barbarian peasant should, in the first year of his obtaining the Empire of the East, have conceived or adopted so bold a design: it is much more remarkable that within so few years he should have executed in masterly fashion the codification of the jurisprudence and legislation of more than seven hundred years, from Cato the Censor to his own time. But it is a still more striking fact that the law books, issued at Constantinople by Justinian for the lands surrounding the Eastern half of the Mediterranean in the beginning of the sixth century of our era, should be directly or indirectly a large, or even the principal, source of private law in all the civilized countries of the world in the nineteenth century. As a basis for the scientific study of law Justinian's law books have still no rival. We in England do not stand in the same close and direct connexion with them that our continental neighbours do. No part of the Digest or Code is law with us, or is now of more than illustrative or casual bearing on the decisions of our courts. But partly through the early law-writers, much more through the Chancellor's jurisdiction, and partly, perhaps in an increasing degree, through intercourse with other nations and through literary and professional training, the Roman law has materially helped, and is still helping, to form our rules for the business of life. It may be that a cultivated nation having to form laws for itself would naturally devise a body of rules in many respects very similar to those actually in force here or on



the continent: but cultivated nations do not exist without laws already; and laws are not sudden creations but the slow growth of time, in other words their shape is due to a nation's past history as well as to the practical exigencies of life. The intellect of the nineteenth century can no more deny or shake off its hereditary allegiance to the law of Rome, than it can to the philosophy and art of Greece. And for the law of Rome we have to thank Justinian and his great minister Tribonian.

Whether the Emperor or his minister have the largest claim to our respect is rather a curious than a fruitful question. One may well guess, that the scheme originated with the skilled lawyer, who afterwards assisted in and presided over its practical execution. But the Emperor had at least the ability to comprehend its importance, the courage to adopt it, and the energy and persistence to carry it through. An absolute monarch has not indeed the special difficulties to contend with, that a constitutional sovereign or a parliamentary minister has, in dealing with legal reform, but the isolation and uncertainty of an absolute monarch's position, the danger of waywardness, the influence of private temptations are so great, that there is as much to claim our respect and gratitude in the resolve of the Emperor as in the excellence of his instruments. The good judgment that found Belisarius and Narses for the work of war was shewn previously in the selection of Tribonian for the work of peace: and while fully admitting that Justinian has often the praise and blame which more strictly may belong to Tribonian, and that Tribonian in the same way stands responsible for the merits and demerits of Theophilus and Dorotheus and their colleagues, I am content to use the names almost indiscriminately as symbols of a great achievement, and leave to others the hopeless problem whether he who wisely selects the instruments or he who faithfully and skilfully executes can best claim the credit of the work.

But there is another point of view from which one part, and that the most important, of Justinian's legislation deserves to be regarded. The Digest is not only, or for us chiefly, a law book with Justinian's sanction, but it is a collection of fragments, mutilated and interpolated to some extent, but still fragments, of some of the great masters of Roman jurisprudence. Latin literature from Nerva to Alexander Severus comprises Tacitus, Pliny the younger, Juvenal, Suetonius, the short but elegant apology of Minucius Felix, the antiquarian Gellius, the affected Fronto, and the lively

though very different African writers, Apuleius and Tertullian. And those are all that deserve mention. But the first two names drop off with Trajan, and from Hadrian onwards the real strength of Roman literature was in law. Celsus and Julian, Pomponius and Gaius, Marcellus and Cervidius Scaevola, Papinian, Paul, and Ulpian are the writers who represent Roman thought for a period of more than 100 years, and have been the teachers to the subsequent world of one of the chief divisions of systematic knowledge and practical literature. In this light, it is true, Justinian and Tribonian have an ambiguous reputation. It is common enough to visit them with scorn and blame for what they have destroyed, rather than praise for what they have preserved; to reproach them with their alterations and interpolations; and in fact to treat them more as slaves who have plundered their masters' treasures and not known how to use them, than as guardians who have saved what was possible from a general conflagration. But after all they have a sufficient and a twofold answer. First, it is very improbable that much of the original works of the Roman jurists would have come down to us at all, if it had not been for their collection and abridgment under imperial sanction; and secondly, the primary and paramount use of law is to be a practical guide in the business of men. No consideration of antiquarian wishes ought for a moment to prevent the thorough adaptation of the law to the real needs and conveniences of the time. Happily for us Justinian felt the authority the law derived both from its antiquity and from the great names of the ancient jurists, and found a means, rough and unscientific but practical, of working in the spirit of the great lawyers themselves and preserving much of the past without doing injustice to the wants of the present.

There is no more difficult task of practical literature than the codification of the law of a nation, and it is connected with the equally difficult task of arranging for the practical application of the code by the judges and for its continual amendment. Written law is like a forest: if underwood be allowed to grow freely, the forest becomes impenetrable. Justinian forbade commentaries and all comparison of his new Digest with the writings from which it was compiled. Napoleon's exclamation on seeing a commentary on the *Code Civil* was "*Mon Code est perdu.*" Doubtless it is impossible to prevent explanations of the law from being written, and it would be undesirable if it were possible. The writings of jurists have a

twofold purpose and effect: they tend to improve the law itself as a system of principles and rules, and they bring the conceptions of the judges and practitioners and of the general public itself into accord or intelligent relation with the system. Reports of decided cases come under the same category. The decision itself has only a special and limited bearing, but the arguments of counsel and the reasons of the judge are essentially the discussions of jurists, and, when reported, become part of the class of juristic literature. They are the only discussions which the people in general read at all, and in fact are the main source of legal education to laymen. Reports are however destined for a further purpose, and one for which jurists' writings are at least not so openly used. They are quoted in the courts not merely to instruct the mind of the judge but to influence his decision; not merely to let him see all the bearings of the case at issue, but to impose on him a somewhat vague necessity of making his decision in the case before him consistent with that given by a judge in a previous case of a similar character. When this principle is once fully admitted, reports are multiplied without limit, the law, whether codified or not, becomes dispersed through hundreds and thousands of volumes, and there is ultimately, owing to the mass of literature, the inevitable progress of thought, and the ineradicable divergency of human minds, no more security for consistency of decision than there would be, if no reported cases were quoted at all. In the vain desire to prevent or remedy one evil another still greater is forgotten and encouraged.

For there is a real and constant opposition between the interests of the suitor and the tendency of scientific law. I put aside the vulgar opposition between the interests of practitioners in the law's being complicated and dear, and the interests of suitors in its being simple and cheap. That opposition may under certain circumstances exist, but it is one which the public can in time overcome. The opposition that I refer to is inherent in the nature of the subject. Legal conceptions, however you may define and explain, will not have the same content in all minds, and the facts to which they are applied will wear a different aspect according to the presumptions which the judge brings to bear on them. The more thoroughly a matter is investigated, the more fully it is compared with other cases, the more the application of different legal principles or categories to it is discussed, the greater chance there would appear to be of the right decision being arrived at in the particular case, and of the



general law being set in clearer light. But the process is long and costly, and, cases being thus selected only by accident<sup>1</sup>, the general improvement of the law is very slight and very slow. The suitor's real interest is forgotten. It may seem paradoxical, but I believe it is on the whole true, that, apart from questions of life, freedom and honour, a suitor's real interest lies not so much in a just decision as in a speedy and final decision. *Summum jus summa iniuria* is true in more senses than one. A perfectly just decision would often be badly purchased by the loss of time, temper and money, and by the paralysis of uncertainty. And that the decision, when obtained, is perfectly just, is a proposition of the truth of which the successful party is often the only person to be confident. There is usually in a disputed question some right or reasonable claim on each side: the decision must of course turn on the balance of probabilities and equities; but if the balance is eventually not quite rightly adjusted, a bystander will console himself for the failure of justice by the reflexion, that the law no longer prevents the parties from adjusting themselves to their now ascertained circumstances, and seeking in a wise and energetic future the remedy for the mistake of the past. A statesman will try to improve the law by other means than the prolongation of a private suit between those, to whom the immediate interests are of more importance than the solution of legal difficulties or the improvement of legal procedure.

Ultimately it will I believe be found best to leave each private suit as much as possible to the *viri boni arbitratus* acting authoritatively and publicly, whether he be called judge or arbitrator. Let the preparatory stages be under his control: let him order the proceedings as in the particular case may be best calculated to bring the issues out clearly: let all witnesses be examined who can throw light on the matter, whether the parties call them or not: let him stop the inquiry whenever it is being carried, even by the parties' consent, to an unreasonable length. It is *peccati exempli* to have litigation run on, till the cost in time and money to the public and the parties is out of proportion to the attainable object of the suit.

In points of law no decision in a parallel case should be quoted except that of an appeal court<sup>2</sup>, and the decision itself should be

<sup>1</sup> See Maine's *Ancient Law*, chap. ii. pp. 38, 39.

<sup>2</sup> I recently examined the decisions in one Part of the Law Reports, containing a large number of appeal cases. In one half the judgment of the Court of first instance was reversed. If this be a fair sample, it is an even chance

subject to review only once, and that, at least in most cases, only with the consent of the judge.

But the law itself must be better ascertained. There must be a code, or something like one, and there must be means for its continued improvement. As a scientific consolidation of the law no jurist would approve Justinian's plan. It had however two great merits; it was actually done within a very short time, and it gave the people and the practitioners the law to which they were accustomed, with only such alterations as probably had long been desired. A new code, with new definitions, method and arrangement, may or may not, according to the skill of the draughtsman, be greatly superior, but there is more difficulty in its execution, more criticism to be encountered, and more risk of its not being understood. Few of the judges who have to apply it will be scientific jurists, and it is easy to be too logical for the mass. The problem of consolidating the common law must in every country be an arduous one, but the difficulty is not insuperable, and one gets weary of finding an imagined future perfection made a bar to present improvement. The better should not for ever be an enemy to the good.

Almost more important than the code is the means for keeping it abreast of the development of men's minds and of new circumstances. A standing Commission having a small nucleus of scientific and practising lawyers, with large power of temporary and special addition, should be continually considering the code and preparing such alterations as may be shewn, either by reports of cases or by scientific criticism, to be desirable. The decisions of appeal courts should be specially considered with a view to incorporation. A revised code should be issued at regular intervals, say every five or ten years, and the previous decisions even of the appeal courts should then be no longer citable in cases commenced subsequently.

With these brief remarks suggested naturally by the subject of the Digest, I pass to the subject itself.

The reign of Justinian occupies five brilliant chapters of Gibbon's history, and I shall therefore content myself with a brief notice. It is only the first few years of it which concern the present subject. His father's name was Iztok, his mother's Bigleniza, which were translated or latinized into Sabatius and Vigilantia. He was born

whether the first decision be right or wrong, according to the judgment of the Appeal Court, and cannot therefore be trusted as a guide in other cases.

in 482 or 483 A.D. at the village Tauresium, near the site of the modern Sophia. His uncle, a peasant, whom we know as Justin I. became a soldier, rose from the ranks to the command of the Guards, and on the death of Anastasius was made emperor by the soldiers A.D. 518. He adopted his nephew Uprauda, who succeeded him in the year 527, and reigned for more than 38 years. Justinian at once commenced the reform of the law, and did not allow it to be delayed by a sedition in Jan. 532, which was excited by the rivalry of the blue and green factions of the circus. They set fire to the city and demanded and obtained the removal from office of the ministers Tribonian and John of Cappadocia; and the tumult was only quelled by a massacre of the greens, effected by three thousand veteran soldiers and the orthodox blues. The conquest of the Vandals in Africa, and of the Goths in Italy, and the defeat of the Persians, all by Belisarius, and a renewed conquest of Italy by Narses, were the principal military glories of Justinian's reign. His buildings were no less remarkable. In Constantinople and its suburbs alone he raised 25 churches, and amongst them the church of St Sophia is as memorable in architecture as his other achievements in their respective lines. 'There was nothing erected during the ten centuries from Constantine to the building of the great mediæval cathedrals which can be compared with it. Indeed it remains now an open question, whether a christian church exists anywhere of any age, whose interior is so beautiful as that of this marvellous creation of old Byzantine art<sup>1</sup>.' A chain of more than 80 forts from Belgrade to the Black Sea was formed to protect the empire from the northern barbarians, but this was only part of the system of fortification which was carried out on many other borders. Justinian was courteous and patient, temperate and frugal, constantly engaged in the work of administration: 'he professed himself a musician and architect, a poet and philosopher, a lawyer and theologian. But he was not a successful ruler: the people were oppressed and discontented; his wife and many of his ministers abused their power: his name was eclipsed by those of his victorious generals. He died A.D. 565<sup>2</sup>.'

'Tribonian was a native of Side in Pamphylia, and his genius 'embraced all the business and knowledge of the age. He composed

<sup>1</sup> Fergusson, *Hist. of Arch.* vol. II. pp. 444.

<sup>2</sup> An interesting notice of Justinian by Prof. Bryce is entombed in the new edition of the *Encyclopaedia Britannica*.



'both in prose and verse on a strange diversity of curious and abstruse subjects: a double panegyric of Justinian and the life of the philosopher Theodotus; the nature of happiness and the duties of government; Homer's catalogue and the four and twenty sorts of metre; the astronomical canon of Ptolemy; the changes of the months; the homes of the planets and the harmonic system of the world. From the bar of the praetorian prefects he raised himself to the honours of quaestor, of consul, and of master of the offices'. His gentleness and affability were admitted, but he was charged with impiety and avarice. In the sedition of 532 he was removed from office, but was speedily restored, and continued to enjoy the confidence of the emperor till his death in 546<sup>1</sup>.

## CHAPTER II.

### JUSTINIAN'S LEGISLATION.

OUR knowledge respecting the method adopted by Justinian in his rearrangement and codification of the law is derived from the decrees which were issued by him for the direction of the work, and which are prefixed to the several parts of it.

45/ The first step was to compose one Code which should contain the imperial constitutions which were comprised in the Codes of Gregorian, Hermogenian and Theodosian, and those subsequently issued. But collection was not the whole task: the laws were to be edited as well. 1. Superfluous matter, not touching the real purport of the constitution, but inserted merely as preface, was to be omitted. 2. The constitutions were to be compared, and repetitions and contradictions to be removed, excepting so far as the division of the law into different parts required their preservation (*praeterquam si juris aliqua divisione adiuvantur*. Cf. *Const. Summa*). 3. What was obsolete was to be removed. 4. Additions, omissions and changes were to be made in the constitutions themselves, where convenience required it. 5. The constitutions were to be classified according to their subject matter into different titles. 6. They were

<sup>1</sup> Condensed from Gibbon, chapp. xliii. xliv. The description of Tribonian does not rest on sure evidence.



to be arranged in each title in chronological order, with their dates appended, the absence of a date not however to detract from the authority of the constitution. 7. Rescripts addressed to individuals and pragmatic sanctions (i.e. charters addressed to communities. Cf. Cod. I. 23. 17), if included in the Code, were to have the force of general law. This Code was to be compiled by a commission of ten persons, of whom Johannes was named first and Tribonian sixth. Seven were high officials, a professor of law at Constantinople, Theophilus, was the eighth; and two practising lawyers made up the number. The Constitution was dated 13 Febr. 528 A.D. (Const. *Haec quae necessario.*)

In little over a year the task was completed. On the 7th April, A.D. 529, Justinian issued a constitution announcing the completion of the *Codex Justinianus*, and directing it to have exclusive validity from the 16th of that month. No constitutions were to be cited in the courts, except such as were contained in the Code; and whatever alterations had been made were not to be impugned. Cases in the courts were to be decided on the basis of the old legal commentators and this Code. No constitutions not contained therein were to be valid, except such 'pragmatic sanctions' as only granted special privileges to communities or corporations, and such as dealt only with special points (*pro certis capitulis factae*), and were consistent with the code. (Const. *Summa.*)

The next step was a more difficult one. Justinian determined to do, what as he says no one had attempted before, to collect, amend and digest the authorized Roman law from the writings of the old lawyers (see below, ch. VI.). Having found Tribonian, from his labours on the Code, to be well qualified for the task, he entrusted it to him and to such colleagues, both professors and practising lawyers, as he should select. The writings of those lawyers only who had received official recognition were to be taken; all selected passages were to have the force of law equally; neither the number of authorities nor the importance of some (e.g. Papinian) were to affect the question. Contradictions and repetitions were to be cut out; even what was already to be found in the Code was not to be repeated in the Digest, except so far as circumstances might require or justify some repetitions; and such additions and corrections were to be made both in the writings of the lawyers and in any constitutions quoted in those writings, as might be necessary for the perfection of the Digest. Any obsolete laws were to be omitted, the test

being the practice of the courts and the custom of Rome, both old and new (i.e. Constantinople). No commentaries were to be written in future on the Digest, and no contractions or abbreviations to be used in writing it out, even the numbers of the books to be written in full. The matter was to be arranged in fifty books and subordinate titles, in accordance with the Code already published and the perpetual edict of Julian. This constitution is addressed to Tribonian and dated 15 Dec. 530 A.D. (Const. *Deo auctore*.)

In the performance of this task it was found necessary to settle a number of much-disputed points, and to abolish some distinctions and obsolete practices. For this purpose Justinian issued a series of fifty decisions on disputed points, and many other constitutions for the amendment of the law (Const. *Cordi* § 1; Inst. I. 5. § 3). The ground being thus cleared, Tribonian and his assistants completed the Digest. In two constitutions, one in Latin (commencing *Tanta*), one in Greek (commencing *Ἐδωκεν*), issued for its confirmation on the 16th Dec. 533 A.D., Justinian gives an account of the work. The two constitutions are very similar, but are both originals, and sometimes one is fuller and clearer than the other. Tribonian chose for his assistants one high official, Constantinus, two professors of law at Constantinople, Theophilus and Cratinus, two professors of Berytus, Dorotheus and Anatolius, and eleven lawyers practising at Constantinople, Stephanus, Menas, Prosdocius, Eutolmius, Timotheus, Leonides, Leontius, Plato, Jacobus, Constantinus and Johannes (§ 9). A large number of books were collected, principally from Tribonian's own library, some of the books being rare and even their titles unknown to most of the lawyers of high repute (§ 17). Some were found to contain nothing worth extracting. Those which furnished materials for the Digest are stated to be named in a list prefixed to the Digest (§ 20). This list (or at least a list of this kind) is preserved in the Florentine ms., and contains the names of 38 authors, 207 treatises, and a total of 1544 books<sup>1</sup>, i.e. volumes or rolls; many of the treatises being very voluminous. The list, however, is not quite accurate, some treatises not having supplied extracts, and some treatises which have supplied extracts not being named, but the discrepancies are not important<sup>2</sup>. Tribonian had suggested to Jus-

<sup>1</sup> One book of Paul's is named twice over.

<sup>2</sup> These discrepancies are noted in the list drawn up by Krüger and appended to Mommsen's larger edition, vol. II. p. 59\*. It appears that one author, Aelius Gallus (from whom a single extract is taken) is omitted, as well as 26 treatises, apparently small, and usually supplying only one extract each. Of these 11 are

tinian that there were almost 2000 books containing 3,000,000 lines which ought to be examined. Instead of these three million lines Justinian's Digest contains as he states about 150,000<sup>1</sup>, the matter being arranged in seven parts and fifty books (§ 1). The full powers of correction, omission and addition granted by the constitution *Deo auctore* were exercised, but the name of the author from whose writings the extract was taken, was invariably prefixed (§ 10). Matters dealt with by imperial constitutions were as a rule omitted from the Digest (§ 14). Any apparent contradiction would be found on attentive examination to disappear, owing to some delicate point of difference (§ 15). The Digest (with the other imperial law books) was made the exclusive legal authority, no one being allowed to compare its provisions with the writings from which it was taken, or to cite them in court or in any legal proceeding (§ 19). No abbreviations in writing the Digest and no commentary were to be allowed. No one was to cite from a copy containing abbreviations in court, and the copyist was to forfeit twice the value to the owner of the book and to incur the penalty of forgery (*falsi*, § 22). Under the same penalty it was forbidden to make any commentary on the Digest; only literal (*κατὰ πόδα*) translation into Greek, and *παράτυλα*

by Paulus, 5 by Gaius, 4 by Ulpian. *Alfeni Digesta* is mentioned, the Epitome by Paulus is not; Labeo's *Posterioriores* are mentioned, *Javolenus ex posterioribus Lab.* is not; others appear to be wrongly described. Again, one author, Sabinus, and 15 treatises are named in the Index, but no extract from them is found in the Digest. These are chiefly single-book treatises of Paulus.

<sup>1</sup> The Florentine ms. (according to Mommsen vol. i. p. xi.) contains, besides index and prefatory constitutions and title, 887 leaves, of 4 pages each, each page having 44 or 45 lines, i.e. in all between 156,000 and 160,000 lines.

Some estimate of the work of Justinian may be made in this way. As a basis for comparison I take Mommsen's Digest (stereotype edit.) which has 873 pages of (say) 5900 letters of text; each page averaging 2 cols × 72 lines × 41 letters). The Digest itself, apart from prefaces, &c. contains about one-third more matter than Kerr's Blackstone (1st edit.), if Kerr's appendices be disregarded and the space occupied by the notes be estimated as if filled with text. Then if the Digest is equal to  $5\frac{1}{3}$  vols. of the average size of Kerr's Blackstone, and the ratio of the Digest to the treatises from which it was compiled was, as Justinian says, 1 to 20, we get the result that Justinian compressed a law library of 106 vols. into one of  $5\frac{1}{3}$  vols. If there were contractions in the old books as in the ms. of Gaius, and these were compared by Justinian to his uncontracted Digest, we should have to increase the quantity in old books by an addition of one-fourth (25 per cent.)

If there were 2000 books, the average size of each book would be about  $8\frac{3}{4}$  pages of Mommsen (= 30 pages of Kerr); if there were only 1600 (see p. xxiv and note) each book would average nearly 11 pages of Mommsen. An average book of Gaius' *Institutes* is equal to  $11\frac{1}{2}$  pages Mommsen; of Justinian's *Institutes*  $13\frac{1}{4}$  pages; of Quintilian's *Institutes* 14 pages. A book of the Digest itself averages  $17\frac{1}{2}$  pages. Hence we may guess at the length of Ulpian's *Commentary on the Edict* (83 books × 14 pages Mommsen =  $7\frac{1}{2}$  Kerr's vols.?)



were to be allowed (§ 21). What were παράτιτλα, Zachariae a Lिंगenthal has shewn by examples actually found in some Byzantine compilations. They were short summaries added to each title, giving references to other parts of the law books where the same matter was treated, and a brief account of such passages (Heimbach *Proleg.* ad Basil. vol. vi. p. 4). The Digest was to have the force of law from 30 Dec. 533.

To complete the reformation of the law Justinian provided for the education in the schools a new book of elements and a new course of study. In the instructions for preparing the Digest he had already hinted at the possibility of a new book of Institutes (Const. *Deo auctore* § 11). Accordingly he directed Tribonian, with the assistance of Theophilus and Dorotheus, to examine the institutional treatises then used, and compile, with due corrections and notices of the amending constitutions, new Institutes in four books (Const. *Tanta* § 11). In the preface to the Institutes Justinian says they were compiled from all the Institutes of the old writers, but especially from the *Institutiones* and *Res cottidianae* of Gaius. The constitution approving of them was dated on the 21 Nov. 533, but was to take effect from the same day as the Digest, viz. 30 Dec. 533.

Directions for a new course of study were issued on the 16 Dec. 533, in a Constitution addressed to Theophilus, Dorotheus, Theodorus, Isidorus, Anatolius, Thalelaeus, Cratinus and Salaminus, all described as professors (*antecessores*). Justinian describes the course of study then in use as spread over five years but badly arranged, the order of the edict being disregarded, and an injudicious selection being made out of a number of books, with useful and useless mixed together. The first year's instruction was from six books, viz. two books of Gaius' institutes (perhaps the Epitome which forms part of the *lex Romana Visigothorum*: cf. Dernburg, *Gaius*, p. 132) and his four one-book treatises (*libri singulares*) on Wife's property, Guardianships, Wills and Legacies. The second year was given to the matter of Justinian's first part, i.e. Jurisdiction and Procedure, and after that to portions of Justinian's second or third parts, i.e. actions *in rem* and commercial contracts. In the third year was taken whichever of these second and third parts was not taken before: and eight out of Papinian's nineteen books of answers (*Responsa*) were added, but only in short selections. This was all that the professors lectured on. The Answers of Paulus (*Pauliana responsa*) the students had to read by themselves in the fourth year. What was



learnt in the fifth year is not stated, but from the preface to the Institutes it may be inferred that it was some of the Imperial Constitutions. The customary names of the students were in the 1st year, *Dupondii*<sup>1</sup>; in the 2nd, *Edictales*; in the 3rd, *Papinianistae*; in the 4th, *Λύται* (i.e. freed from lectures); in the 5th, *προλύται* ('advanced *Λύται*').

Justinian's new plan was based on the old one, but adapted to the Digest and made more definite. He gave his own name to the first year students—*Justiniani novi*. They were to be lectured first on the Institutes and then on the first 4 books of the Digest (Jurisdiction and Preliminary matters). For the second year the whole either of the second part (Books v.—xi.) or of the third part (Books xii.—xix.), and in addition the first of the three books on Dowry (Book xxiii.), the first of the two books on Guardianship (Book xxvi.), the first of the two on Wills (Book xxviii.), and the first of the seven on Legacies (Book xxx.). For the third year was to be taken whichever of the second or third parts was not taken in the second; and in addition the three books following, viz. on Pledge (xx.), on the Aediles' Edict and Eviction (xxi.), and on Interest, Evidence, &c. (xxii.). Of the book on Pledge five out of six titles are made to commence with an extract from Papinian, so that the name of *Papinianistae* for the students might still have some justification. To the fourth year were allotted for private study the remaining ten books of the series (xxiii.—xxvii.), which were not taken in the third year. The fifth year was to be devoted to the Code. Law schools were sanctioned only in Constantinople, Rome and Berytus; those in Alexandria, Caesarea and elsewhere being suppressed, under the penalty for a teacher of a fine of 10 lbs. of gold and banishment from the town. This constitution was dated 16 Dec. 533 p. Chr. (Const. *Omnem*.)

Justinian speaks with natural pride of the completion of this work. But Tribonian was not satisfied. The composition of the Digest had necessitated so many new Constitutions that the Code was no longer sufficient, and a new edition (*repetita praelectio*) was requisite. The task was given to Tribonian, Dorotheus, Menas, Constantinus and Johannes to incorporate the new Constitutions in

<sup>1</sup> The origin of this term is obscure; Justinian calls it *tam frivolum quam ridiculum cognomen* (Const. *Omnem*. § 2). *Dupondius* may denote either two pounds, or a brass coin in value half a sesterce, or two feet. If we compare *Pers.* v. 76 *Dama est non tressis agaso*, 'a groom not worth threepence', we may guess that the freshmen were called contemptuously 'Twopennies'.

fitting places in the Code, and boldly to amend, omit, amplify and make clear. The work was finished by the 16 Nov. 534, and directed to take effect from the 29 Dec. 534, the former Code and all other Constitutions being abrogated (Const. *Cordi*).

This second edition of the Code is the one which we have. The earliest constitution contained in it is one of Hadrian's, and there are in all only 23<sup>1</sup> before the reign of Severus. After that they are frequent. (See the chronological table appended to Krüger's edition). The earlier constitutions, so far as they were of general and permanent character, were incorporated in the jurists' writings, and form part of Justinian's law only so far as the extracts in the Digest or the Institutes may chance to contain them. The Theodosian Code, the Vatican Fragments, and general literature have preserved others. (See Hänel's *Corpus Legum*.)

After the publication of this second edition of the Code, Justinian issued from time to time other Constitutions, mostly in Greek. Of these about 170 are still extant, and form part of the *Corpus Iuris*. They are called *Novellae* (new Constitutions). Zachariae a Lingenthal has arranged them<sup>2</sup>, with a few others probably issued before the second Code, in chronological order, 174 in all, the last of which belongs to the year 565 p. Chr., in which Justinian died, aged 83. Of these Novels one is of great importance as altering the order of intestate succession to the form which has since been prevalent in Europe, and which mainly rules intestate succession to personalty in England at the present time. It is Nov. 118 = 143 Zach. published 543 p. Chr. It is a significant fact that only 20 of the whole number are later than the year of Tribonian's death, 545 p. Chr.

### CHAPTER III.

#### DIVISION OF THE DIGEST AND ORDER OF THE TITLES.

JUSTINIAN divided the Digest into 7 Parts and 50 Books. In each book the matter is further subdivided into Titles, of which there are 432. Three books however (*De legatis* xxx—xxxii.) are

<sup>1</sup> Rudorff (*Rechtsgesch.* i. p. 314) speaks of 180 constitutions from the Divi Fratres and 192 from Commodus. This is quite wild. Cf. Zimmern, i. p. 179.

<sup>2</sup> Published in the Teubner series of classical authors.

not subdivided at all. Each Title consists of one or more extracts, the total being 9142. Some of these extracts are very short, others of considerable length, and in the middle ages were divided into several paragraphs, each containing as a rule a different case or point of law. I estimate the total number of paragraphs and undivided laws together at about 19000.

Of the Parts the 1st is called by Justinian *πρῶτα*, containing Books I.—IV.; the 2nd *de judiciis* (v.—xi.), from the initial words of the first title; the 3rd *de rebus* (xii.—xix.), on the like ground; the 4th, *Umbilicus Pandectarum*, is the central Part (xx.—xxvii.); the 5th *De testamentis* (xxviii.—xxxvi.); the 6th contains xxxvii.—xliv.; the 7th, xlv.—l. This division rested probably on some usual classification of the matter, at least as regards the first three and the fifth parts. The sixth part to a large extent is dominated by the idea of possession, the fourth and seventh are clearly made up of heterogeneous materials, and their size was dictated by the desire of symmetry or by mystic associations. A similar notion seems to have existed in grouping the titles into books. The total number of books was prescribed beforehand (Const. *Deo auctore* § 5).

Justinian's words are very noticeable. *Et in septem partes eos digessimus, non perperam neque sine ratione, sed in numerorum naturam et artem respicientes et consentaneam eis divisionem partium conficientes. Igitur prima quidem pars totius contextus, quae Graeco vocabulo πρῶτα nuncupatur, in quattuor libros seposita est* (Const. *Tanta* §§ 1, 2). So in the Greek Const. *Δέδωκεν* we have *καὶ τοῦτο οὐ παρέργως, ἀλλὰ τῆς τῶν ἀριθμῶν φύσεώς τε καὶ ἁρμονίας στοχασάμενοι*. Hofmann (*Z. R. G.* xi. 340 sqq.) points out the probable connexion of these words with the later Pythagorean mysticism respecting numbers (cf. Ritter and Preller *Hist. Phil.* §§ 104, 116. ed. 2), and gives some details, of which I extract the most striking. The number 50 for the books was fixed on beforehand: we may remember also the 50 Decisions. The nearest root of 50 is 7 ( $50 = 7 \times 7 + 1$ ). Justinian makes 7 parts, not however, as one might have expected, six parts of 7 books each and one of 8 books for the middle, but he commences with a first part of 4 books. Four (Tetractys) is the mother of the perfect number 10 ( $= 1 + 2 + 3 + 4$ ), and is the 'root of all things<sup>1</sup> and source of nature'. So Justinian directed Tribonian to

<sup>1</sup> Hofmann refers to Irenaeus and Themistius. 'See also Sext. Emp. *Math.* iv. 3; vii. 94, with Fabricius' notes; Hierocles *Carm. Aur.* p. 166 (Fragm. Phil. ed. Didot. i. 464). See Zeller, i. p. 368 n. ed. 4. where the ancient Pythagorean oath by the Tetractys is given. Macrobius, *Som. Scip.* i. 6. § 41'. Jos. B. Mayor.



make an introductory treatise (the Institutes), and in that also *quidquid utile...sit, quattuor libris reponere, et totius eruditionis prima fundamenta atque elementa ponere*. (Gaius divided his subject into three (§ 8), but made four books of Institutes). The remaining six parts are divisible into halves (II.—IV. and V.—VII.) each containing 23 books. Again the three middle parts (III.—V.) have 25 books, and the four outside books (I. II. VI. VII.) have also 25 books. The last part has 6 books, which with the first part makes the perfect 10. Students were to be instructed in 36 of the 50 books, *ut ex triginta sex librorum recitatione fiant juvenes perfecti* (Const. *Omnem* § 5). Now 36 is the ‘great tetractys’ and denotes the universe. Its perfection consists in being the sum of the first four odd, and the first four even, numbers ( $1 + 3 + 5 + 7 + 2 + 4 + 6 + 8 = 36$ ). Fourteen of the fifty books are left for subsequent study (ib. § 5 and cf. § 3). Fourteen is twice seven. There were also fourteen *libri singulares*, viz. 3 on marriage (XXIII.—XXV.), 4 on guardianship and wills (XXVI.—XXIX.), and 7 on legacies (XXX.—XXXVI.). But the number 3 was an especial favourite. *Omni igitur Romani iuris dispositione composita et in tribus voluminibus, id est Institutionum, et Digestorum...necon Constitutionum perfecta, et in tribus annis consummata* (Const. *Tanta* § 12). *Leges autem nostras suum optinere robur ex tertio nostro felicissimo sancimus consulatu, praesentis duodecimae indictionis tertio Kalendas Januarias....Bene autem prope- ravimus in tertium nostrum consulatum et has leges edere, quia...in hunc...et bella Parthica abolita sunt et tertia pars mundi (Libya) nobis adcrevit, et tanto operi legum caput inpositum est, omnia caelestia dona nostro tertio consulatui indulta* (Ib. § 23). In another paper (*Z. R. G.* XII. 180 sqq.) Hofmann shews that a contemporary of Justinian, Cassiodor, attaches the like importance to numbers, especially 50, 7, 12, 4, 3, and makes the division of his books accordingly.

In truth neither parts nor books have as a whole a natural justification. The divisions between them correspond sometimes with the division of the subject, but often appear to be more or less arbitrary. The real unit is the title, which however, according to the quantity and character of the matter, will sometimes be part of a series on the same subject, sometimes itself contain several subdivisions which might be made into separate titles. I proceed to discuss the principles followed by Tribonian in his arrangement of the matter, or in other words, in his arrangement of the series of titles.



Most students of the Digest are at first bewildered with the apparently strange and haphazard distribution of the matter. And this feeling is the stronger because the student is usually acquainted with the arrangement of Gaius or Justinian in their Institutes, and finds that of the Digest very different. Gaius first treats of persons, their position in the state and in the family, i.e. of citizenship, freedom, marriage and guardianship. Then comes the law of property, its acquisition and loss, both as regards aggregates (*universitates*) and as regards individual things. A large portion of this relates to inheritance and bequest, this last being taken out of its proper place among singular successions and placed immediately after heirship by will, and followed by the rules of intestate succession. The law of obligations follows, divided into obligations arising from contract, and obligations arising from tort (*ex delicto*); those from contract being divided into real, verbal, literal, and consensual, and discussed both as to their rise and extinction: those from tort being represented by theft, violent robbery, physical injury to person or property, and insult. Procedure is the subject of the last book; first the old forms of statutable procedure, then the procedure by written *formulae*, i.e. instructions from the praetor to a judge to try particular issues of law or fact: then the parties to an action, including the liability of a father or master for the acts of his children and slaves, and the mode and conditions of appointing an attorney to conduct the case. Special pleas, injunctions, the penalties of improper litigation, and the means of enforcing appearance to a summons close the book. On the whole the matter is arranged in five masses: law of persons, things, inheritance (in the large sense of succession to property vacant by death), obligations, and procedure, the law of inheritance being however incorporated as a whole in the law of things.

These five divisions are very usual in modern writers on Roman law, who, however, often prefix a collection of definitions, rules, and considerations affecting all or many of the parts of law, and called the general part. Procedure is often omitted or only partially represented in the general or introductory part. The order of the rest however is frequently things, obligations, family, inheritance; sometimes family, things, obligations, inheritance; sometimes otherwise. Criminal law is occasionally appended at the end.

These masses are found in the Digest. Speaking roughly, jurisdiction, appearance and preliminary objections, Books I.—V. 1; things,

v. 2—XL; obligations (real and consensual), XII.—XXII.; family, XXIII.—XXVII.; inheritance and bequest, XXIX.—XXXVIII. But after that we have danger to neighbours, and gifts, Book XXXIX.; manumission, Book XL.; acquisition of ownership, XLI.; judgment and execution, XLII.; interdicts, XLIII.; pleas, XLIV.; verbal obligations and their extinction, XLV., XLVI.; torts, XLVII.; criminal law, XLVIII.; appeals, municipal administration and interpretation, XLIX. and L. And confusion seems to be caused by the strange position of some titles, e.g. acquisition of property widely separated from the law of things; verbal contracts separated from bargains (II. 14), and both from real and consensual obligations; damage under the Aquilian statute put far away from theft and insult; action for fraud in Book IV. and plea of fraud in Book XLIV., &c.

Justinian directed the compilers to follow in the arrangement his own Code and the Perpetual Edict, (see ch. xii.) as should be found most convenient (Const. *Deo auctore* § 5). The code thus referred to is not now extant. The second edition which we have agrees in the main arrangement with the Digest, but there are some minor divergencies. Possibly some of these may be due to the revision. In any case the main lines seem to coincide with the Edict, which had probably served as the guide in the arrangement of the first code.

Though the Edict itself is not preserved, its arrangement may be confidently gathered from the sequence of matters in the *Digesta* of Julian, its framer, and in the three commentaries by Gaius, Ulpian and Paulus, numerous fragments from which occur in the Digest. In many parts indeed the Commentary of Ulpian furnishes the bulk of the titles in the Digest on matters treated in the Edict. The principal differences in the arrangement of the matter in the Digest from that in the Edict appear to be (1) that the Edict put theft immediately after guardianship and before the law of patrons and of succession to property of deceased persons; (2) that intestate succession preceded wills and legacies; (3) that action for tumult, robbery by violence, and insult preceded judgment and execution; (4) that the edict of the Curule Aediles was appended at the end of the Praetor's edict instead of being incorporated with it; (5) that the Praetorian recognisances (*stipulationes*) were put all together after interdicts and pleas, instead of some in the Digest being put with the law to which they specially related.

Rudorff and others speak of the Digest as following the order of Gaius' Institutes, viz. persons in I. title 5—7; things in I. title 8,

and actions I. title 9—L. 15, but say that the material part of Gaius' law of persons and things has been brought into the law of actions (*Rechtsgesch.* I. p. 302). This seems to me to be a delusive comparison. Partly from the different character and object of the Institutes and the Digest, partly from the changes in the law, the treatment and order of the matter is really quite different, the resemblances as regards the matter of persons and things being superficial and almost accidental, and as regards other matters being due either to the natural connexion of the subjects or to the Praetor's edict.

The Digest is a handbook for practitioners, not a systematic treatise for students. It treats of who are judges, who are plaintiffs and how they can get defendants into court, what matters are actionable, the effect of a judgment and the means of enforcing it, and then other remedies such as injunctions and recognisances. Matter necessary for the explanation of the various actions is prefixed, often in separate titles, and cognate matter is sometimes appended in other titles. It is the insertion of these prefatory and explanatory titles and occasional digressions, which often prevents a student from catching the main lines of the arrangement.

I proceed to examine more in detail the order of the titles.

Book I. titles 1—4 contain introductory, general and historical matter.

Titles 5—7 treat of the distinction of free and slave, father and child, regarded as subjects of rights and capable or incapable of suing or being sued.

Title 8 treats of the distinction between things which can and can not be private property, and therefore objects of a suit.

Titles 9—22 of officials, so far as their private rights are affected by their position or as they have jurisdiction over suits.

Book II. treats of jurisdiction (titles 1—3) and of the means of securing a defendant's appearance to the suit (titles 4—12).

Title 13 is *de edendo*, i.e. of production of documents in judicial proceedings, and especially of the plaintiff's duty, fully to state the nature of his action; and of bankers' duty to produce their accounts with their customers.

Title 14 (*de pactis*) treats of bargains not to sue, i.e. of agreements for the settlement or waiving of claims before action brought, with some general remarks on bargains and contracts.



Title 15 is *de transactionibus*, i.e. of compromises of a doubtful claim, but specially treats of compromises of claims for annuities.

Book III. is of the parties to a suit, i.e. of those who are disqualified to bring an action, of agents and defenders, both those duly appointed and those acting without appointment (*de negotiis gestis*), and of those who are bribed to bring, or not to bring, an action (*de calumniatoribus*).

Book IV. treats mainly of the cases, where the ordinary effect of actions and pleas is defeated by annulling the acts on which they rest, in consequence of intimidation or fraud, or of the insufficient age or other disability of the party attacked. *Restitutio in integrum* is here regarded as a bar to the ordinary procedure. Then in title 7 comes another bar of the like kind, that of endeavours to avoid trial by alienating the object of the suit. Title 8 deals with the duty of an arbitrator who has accepted a reference of a suit to him. Title 9 is peculiar. Its connexion seems to be accidental. *De receptis: qui arbitrium receperint*, i.e. undertakings to act as arbitrator (tit. 8), seems to have attracted to it the law on the duty of shipcaptains and innkeepers to give up what they have received (*ut recepta restituant*). One would have thought the end of the thirteenth book a more appropriate position. But its position in this neighbourhood is not a hasty act on the part of Tribonian, but at least as old as the Commentaries of Ulpian on the Edict.

Book v. title 1 is on the place of trial, and here ends the part of the Digest on procedure and preliminary objection. Title 1 was placed here rather than in one of the earlier books either to make the bulk of the books more equal, or because the initial words of the rubric '*de iudiciis*' happen to be identical with those of the description of the subject-matter, which occupies this and the following books, and formerly made one of the important divisions of law, viz. trials for recovery of things called *de iudiciis (rei persequendae gratia)*. Cf. Just. iv. 6. §§ 16, 17.

The discussion of the subject-matter of suits then follows.

First come *actiones in rem*, e.g. actions by owners, and here, as in Gaius, we have claims to a mass of property put before claims to individual things. The third title, *de petitione hereditatis*, is the principal instance of a claim to a *universitas*, and occupies with smaller connected matters the rest of the book. The second title 'of an undutiful will' is appropriately prefixed to it. It also was an



action which gave a man if successful the position of heir, and it has a resemblance to the matters treated of in the preceding book, because it aims at the annulment of the will.

Book VI. contains the claim to recover your own property : and this is treated in two headings, first where the claimant has a good legal title (*de rei vindicatione*), secondly where he has an honest title, but requires longer possession to cure defects in the conveyance to him (*de Publiciana in rem actione*) ; thirdly when he has a perpetual lease.

Books VII. and VIII. treat of servitudes, and deal with the matter generally, setting forth the nature and creation of servitudes as well as the actions for enforcing them. This action is in each case a *vindicatio*. Book VII. treats of personal servitudes, usufruct, use, claim to services : Book VIII. of rights of light, of prospect, of support, of drip (*servitutes urbanae*), rights of road, of taking water, of pasture, of winning stone and chalk (*servitutes rusticae*). The discussion of the bond given by a fructuary has been transferred by the compilers to Book VII. from its place with other bonds at the end of the Edict.

Book IX. treats chiefly of the actions for damage caused by fault and negligence, as provided by Aquilius' statute expanded by the lawyers. It is not at first sight obvious why this action is treated here rather than with theft and robbery, as Gaius treats it. Heffter (*Rhein. Mus.* I. p. 54) has suggested that Books V. 2—VIII. represent the old action *sacramento*, Books IX.—XI. the actions *per iudicis postulationem*, after which we have actions *per condictioem*. There is a good deal to be said for this view, though Rudorff criticises it unfavourably (*Z. R. G.* III. p. 53), but even without it the place assigned to the matters of Book IX. seems appropriate. Tribonian has separated those torts which have more of a civil character from those which, although they have a civil side, are also frequently criminal. The actions *de pauperie*, *damni iniuria*, *de his qui effuderint*, &c. and noxal actions as a whole, are actions for recovering not indeed your property but a substitute for it. They are in fact actions by owners of what has been damaged or destroyed : they are not the result of any contract ; they are aimed not like a *condictio* at some one with whom we have formed a business connexion, but like a vindication at any person who has deprived us of our property by his own or his family's or his cattle's fault. They do not prosecute an offender as a criminal, from vindictive feelings, but in order to put the injured party in the position as far as possible that he was in before. And

V

they are characterized by the peculiar option given to the defendant, either to pay the damages awarded or to surrender to the plaintiff (*noxæ dedere*) the delinquent slave or beast.

Book x. treats of actions of a special character, in which any one of several persons may be plaintiff and the other or others defendants. Such are suits for division of property: viz. *finium regundorum*, for settling the boundaries of landed estates between neighbours; *familiae erciscundae*, for the division of an inheritance between coheirs; *communi dividundo*, for the division of any other property between tenants in common. In all these cases the parties claim property as their own and seek to have their right established: those who have no right as holders of conterminous estates, or as coheirs, or as tenants in common cannot bring the action; but the judgment is not simply for or against the plaintiff, but for and against both parties, by ascertaining and definitely allocating to them their proper shares, so that they no longer hold with uncertain boundaries or in ideal shares, but each is lord over a specific domain or property.

To this book is added *ad exhibendum*, an ancillary action for the purpose of compelling the production before the judge of any thing in which you have a proper cognisable interest. It was at the service of those who were about to sue *in rem*, or had, or were in the way to have, a claim to the possession of a thing. It lay against any one who had the actual possession, and is called a personal action, because it is not confined to those who assert a claim as owner either of the property in a thing or of a limited right in it, but is open to all *quorum interest rem exhiberi*. It is thus not unnaturally placed at the end of the class of actions which have occupied Books v. 1—x.

Book xi. is a supplementary book. It contains various actions not specially apposite elsewhere, and all more or less connected with those discussed. The first title 'on Interrogatories' is one of several relating to procedure, which we might have expected to see collected into one book and placed after the first title of the fifth book. The others are xii. 2, 3 on oaths; and the last four of Book xxii., viz. title 3 on proofs and presumptions, title 4 on documentary evidence, title 5 on witnesses, title 6 on ignorance of law and fact. The place of the title on interrogatories is due to the edict, and the subject is by Justinian mainly illustrated with references to interrogatories for the purpose of a suit against heirs (e.g. *familiae erciscundae*) and noxal suits. Much the same applies to the short title xi. 2.

Titles 3, 4 and 5 (of Book xi.), on suits for spoiling a slave (*de*

*seruo corrupto*), and against those who conceal runaway slaves and on dice players are perhaps appendages to the action *damni iniuria*. Title 6 on the suit against a surveyor who has given a false measure is an appendage to x. 1 on boundaries. Titles 7 and 8 deal with those rights or restrictions on rights, which arise from pieces of land having acquired a religious character by the burial in them of the dead. To these are appended suits for funeral expenses, which begin with 7. 1 12. § 2. The 8th title might have been put in Book XLII. with other injunctions. But the connexion of subject, viz. injunctions against interference with a right of burial or erecting a monument has led Tribonian to place it here, just as he transferred the treatment of the usufructuary's bond to Book VII.

Book XII. commences an important class of actions which extend to Book XXII. As opposed to the class already dealt with they are (a class of) actions *in personam*, i.e. not claims as owners against all the world, but claims in consequence of a special relation by contract. They may be described as Commercial Actions—loan, pledge, deposit, sale, hire, exchange, agency, partnership, acknowledgement of debt stated, recovery of moneys unduly paid, set-off, claims for interest and mesne profits. To a considerable extent they coincide with the actions arising from real and consensual contracts.

Books XII. XIII. 5 contain *condictiones certi*, and *incerti*, and practically deal chiefly with claims arising from the payment of money, of which a loan of money (*mutuum* XII. 1) is the most typical. With this is connected recovery of moneys paid without consideration (XII. 4 and 7), or for an improper cause (XII. 5), or by mistake (XII. 6). The second title of this book seems oddly placed. It is on oaths. Rudorff (on Puchta's *Cursus* § 162 note *f*) suggests that the original action *per condictionem* favoured a summary settlement of the matter by allowing the praetor to tender an oath to the parties and thus dispense with strict proof and cut short dispute. The next title (XII. 3) is evidently in close connexion, as in case of the defendant declining to obey the sentence and make restoration, the plaintiff was allowed to settle the value of the thing thus wrongfully retained by stating its value on oath: and judgment was then given for the amount of the plaintiff's estimate, the judge however having a discretion to reduce it.

Book XIII. has some supplementary cases of *condiction* and also (title 5) the action *de pecunia constituta* for a stated sum of money



acknowledged to be due. The two last titles of this book are on *commodatum*, i.e. loan of an article which has to be specifically returned; and *de pigneraticia actione*, i.e. the right of a debtor to reclaim the pledged property, on paying his debt and any expenses which the pledgee may have been put to in respect of the pledge. (See below on Book xx.) In both cases however, that of *commodatum* and that of *pignus*, the scope of the action is not mere recovery of possession of the object lent or pledged. Vindication would be enough for that. But the object lent or pledged may have been lost, or the borrower or pledgee may have incurred expenses in relation to it. These actions then were granted by the Praetor to deal with the reasonable claims arising out of the contract, and which were much wider than the mere claim to a bare restitution of the particular object.

The connexion with the preceding titles is easy. The discussion of a loan of money is naturally soon followed by that of a loan of specific articles, and pledge is in fact a loan not for use, but as a security for a debt. It is noticeable that both these actions are spoken of as having been treated in the Edict under the general heading of *de rebus creditis* (D. XII. 1. 1 § 1).

Books XIV. XV. XVI. 1 contain the various actions by which contracts are enforceable against others than those who made them, and especially of slaves and children by and against their owners or fathers, either wholly or partially according to circumstances. The group is headed by the two actions of most general application, those which made a principal liable for the contracts of his agent, whether free or slave, who has been entrusted with the management of a ship (XIV. 1 *de exercitoria actione*), or of a shop or other business (tit. 3 *de institoria actione*). Actions concerned with those who are in another's power follow. Amongst these is inserted a title (XIV. 6) on the *S. consultum Macedonianum* which annulled all right of action by lenders of money to sons who were still in the power of their father, and one on the *S. consultum Uellaeianum* (XVI. 1), which annulled any guarantee or security given by a woman for others' debts. To the title which made a shipmaster's contracts enforceable against the owner is not unnaturally appended (XIV. 2) a title on the *Lex Rhodia*, which enforced a general average, i.e. a contribution on the part of all who have goods on board and of the shipowner to make good the loss of any whose goods have been sacrificed to save the rest.



At first sight it is not evident why the question of liability of *A* for debts contracted by *B* should be discussed in the midst as it were of the commercial contracts. That this order was in compliance with the Edict only puts the question further back. Why were matters so arranged in the Edict? Perhaps the answer is this. The most typical cases of condictio were comprised in Books XII. and XIII. Before passing to more complicated contracts the large question of liability on another's contracts is taken, and discussed not in relation to the subject-matter of those contracts, as sale, hire, &c., but simply as liability for others' debts. The simplest form of liability, that arising from a loan, is enough to illustrate the principles, and it was not desirable to put off longer than was necessary dealing with such typical contracts as loans to children and to slaves on their father's or master's account.

Book XVI. 2 treats of set-off; a title which is naturally connected with loans and particularly affected bankers (Gai. iv. 64).

With title 3 we commence a new division of contracts. In the old law *fiducia* would have come first. Its connexion with deposit is seen in Gai. II. 60. And these with *actio mandati*, *pro socio* and others formed a class of actions, condemnation in which was followed by ignominy (Gai. iv. 182; D. III. 2. 1 1), a consequence which did not belong to actions *de rebus creditis*.

The actions in XIV.—XVII. naturally lead up to that on *mandatum* (agency), and *pro socio*, which occupy Book XVII. Books XVIII. and XIX. 1 treat of the contract of sale and various special contracts and considerations connected with sale. The remaining titles of Book XIX. deal with analogous contracts, that of hire, that of exchange, and others which did not come precisely within the technical definition of either sale or hire.

Book XX. is on Pledge and is mainly occupied with different aspects of the relation from that treated in XIII. 7. The *pigneraticia actio* was concerned simply with the debtor's recovery of his property after he has paid the debt for which it was pledged. Book XX. deals rather with the rights of the pledgee or successive pledgees against one another and against third parties, and generally with the modes in which pledge is created and extinguished. There were formerly three kinds of pledge: *fiducia*, by which the property was conveyed as in our mortgage; *pignus*, in which not property but possession was transferred; and *hypotheca*, where neither property nor possession were transferred but only a personal contract entered

into. Justinian ignored the first (*fiducia*) and abolished all legal distinctions between *pignus* and *hypotheca* (cf. D. xx. 1. 1 5. § 1; Just. iv. 6. § 4). This change has made it unnatural to separate XIII. 7 from xx. But *hypotheca* is the main subject of Book xx. as *pignus* is of XIII. 7. There the question is what is the purview of the debtor's action for recovery of possession of things pledged: in Book xx. what are the circumstances and rights attending *hypotheca*. So that here belongs the *hypothecaria* or *quasi Serviana actio*, the pledgee's action against third parties. And the work from which a great deal of this book is taken is Marcian's treatise *ad formulam hypothecariam*, which has been in arrangement subordinated to extracts from Papinian in order to preserve old traditions in the course of study (see above, p. xxvii).

Book XXI. (title 1) contains important supplements to the law of sale, treating of the right of rescission where there has been any concealment of faults in the thing sold contrary to the rules of the Aediles' Edict; and (title 2) of the consequences of eviction from the vendor's want of title. One would have rather expected that these two titles should have been put before the discussion of pledge. The arrangement suggests that some analogy was seen between a mortgagee, and a purchaser who under the circumstances had only a temporary hold of the thing purchased.

Book XXII. is one of the books made up of titles having no special connexion with each other. The first title is on interest and produce (*fructibus*), and other considerations accessory to sales and to other transfers, and contracts for transfer, of property. The second is on interest in the contract of bottomry. The other titles are quite general; title 3 of proofs and presumptions; 4 of deeds and their loss; 5 of witnesses; 6 of the effect of ignorance of law and fact. They are placed here rather to make up the usual size of a book, and because a large new division of subject-matter is approaching, than because of any special logical connexion.

Book XXIII. commences the matter of Family law, which is treated of under the heads of marriage, dowry, guardianship, and is naturally followed by inheritance, patronage and manumission reaching to Book XL. though with some inconsistent interpolations in Book XXXIX.

Book XXIII. is (title 1) of betrothal, (title 2) of marriage, and (titles 3—5) of the creation of dowry. Book XXIV. treats (title 1) of gifts

between husband and wife, (title 2) of divorce, (title 3) of recovery of dowry after dissolution of marriage. Book xxv. treats (titles 1 and 2) of the claims of husband and wife against one another in respect of dowry and other property. Titles 3—6 deal with another branch of family law, viz. of the rights of children not yet born at the time of dissolution of marriage, and (title 3. 1 5—1 9) of the reciprocal claims of parents and children for necessary sustenance. The book is closed by a short title, 7, on concubines.

Books xxvi. and xxvii. deal with guardians, their mode of appointment and their duties and responsibilities : of the grounds of excuse from acting : of the responsibility of magistrates who appointed unsuitable guardians : and the restrictions on sale of a ward's property.

Books xxviii. and xxix. deal with testamentary inheritance. Book xxviii. regards wills from the side of the testator, i.e. treats of making wills and the necessary conditions of validity. The last title of xxviii. and several titles of xxix. regard wills from the side of the heir, i.e. treat of acceptance or refusal of the position of heir. The first title of Book xxix. treats of a military will and might perhaps have been better put in Book xxviii., if connexion of subject rather than symmetrical size had dictated the distribution of the titles into books. The last title xxix. 7 on codicils is naturally placed just before legacies and trusts.

Books xxx.—xxxvi. treat of legacies, both direct and by way of trust.

Books xxx.—xxxii. are really one book, or rather one title, and symmetry only has dictated their distribution into three books, with no further distribution into titles. The matter is somewhat general. The first has, amongst others, large extracts from Julianus, Africanus and Marcianus, the second from Modestinus and Papinianus, the third from Scaevola. The last part of xxxii. (1 44 to end) was probably originally intended to form a separate title 'on the interpretation of words in legacies'. (Bluhme, *Z. G. R.* iv. p. 299.)

Book xxxiii. deals with special legacies, e.g. of annuities, usufruct, servitudes, dowry, options, land and houses as stocked or furnished, *peculium*, store of provisions, furniture. Book xxxiv. continues special legacies, of aliment, gold and silver, release from debt (*de liberatione legata*), and then (title 4) treats of withdrawal of legacies and of gifts over, alterations, &c. Minor matters occupy the remaining titles. Books xxxv. and xxxvi. treat of conditional legacies, of the



fourth reserved by the Falcidian law for the heir, of the *S. consultum Trebellianum* which transferred to the heir in trust the burdens and benefits which legally fell on the heir-at-law appointed by the will; then of the time of vesting of legacies, and of the security of the legatees either by the heir's bond or by actual possession.

Books xxxvii. and xxxviii. treat of inheritance other than testamentary. The old law, which gave the inheritance of an intestate first to the *sui heredes* and, failing those, to *agnati*, was so largely altered in practice through the praetor's recognising natural claims by the grant of the *bonorum possessio*, that the legitimate intestate succession is treated in the Digest as subordinate to the *bonorum possessio*. After a general title (*de bonorum possessionibus*, xxxvii. 1) we have a series of titles (4—8) dealing with the grant of Possession of the Goods contrary to the devolution prescribed by the will and with the consequent arrangements for upholding legacies and making the persons so favoured by the praetor bring their property into hotchpot. These are followed by title 9 dealing with the case of an unborn child, and title 10 (*de Carboniano edicto*) with the case of one whose claim to be a child of the deceased is disputed. Title 11 deals with the grant of possession in accordance with the will. Title 12 which gives a parent the same rights to the inheritance of his emancipated son that a patron has in his freedman's forms a transition to the treatment of the patron's right, which is discussed, first generally (xxxvii. 14); then in title 15 his right to his freedman's respect; (xxxviii. 1) to his services; (titles 2, 3) to a share of his property; followed by (title 4) the law on the distribution of the deceased's freedmen amongst his sons as patrons, and title 5 evasion by the freedman of his patron's rights.

The rules of intestate succession begin with xxxviii. 6, and extend to the end of the book. The praetor's grant of possession is taken first, and then we come (tit. 16) to the legitimate succession of the *sui* and *agnati* and patron, and (tit. 17) to the reciprocal rights of the mother and children in their respective inheritances, which rights were granted by the senate's decrees called *Tertullianum* and *Orphitianum*.

Book xxxix. has somewhat heterogeneous contents. The first three titles deal with rights against one's neighbour who is constructing or destroying some work, or who neglects to repair property which has become dangerous, or who is altering the flow of rain-water, or drawing off water to which he is not intitled. In the case



of persistent neglect to repair, the praetor gave a right to the complainant to enter into possession of the land where the building was; and this grant of possession appears to be the link which has led to the position of the title *damni infecti* here (XXXIX. 2). The two others (title 1) *operis novi nuntiatio* and (title 3) *aquae pluviae arcendae* come in its company. Title 4 *de publicanis* is more difficult to account for. We can only suppose that the matter was treated in some such connexion by the writers extracted (cf. l 7), and that the links have been omitted by Justinian. (Compare its place in Cod. Theodos. iv. 12.) The last title in the book *de donationibus mortis causa* is required before the doctrine of inheritance is concluded, and the preceding title *de donationibus* is inserted as dealing with gifts in general and therefore introductory to gifts in view of death. The remarks of Bluhme (*Z. G. R.* iv. p. 285 sq.; p. 364, n. 19) tend to shew that the compilers hesitated about the arrangement of the matter in this book.

Book XL. is linked to the preceding books by two attachments, one the law of patrons and freedmen, which formed part of Books XXXVII. and XXXVIII., and the other the frequent occurrence of manumissions by will. This book treats (title 1) of manumission in general; title 3 of manumission *inter vivos*; (title 4) of manumission by will, and (title 5) by way of trust, (title 7) of the position of slaves whose freedom was postponed till a future day or made dependent upon some condition (*de statuliberis*); then (title 8) of cases where freedom was obtained without the master's act, and (title 9) where freedom was not obtained notwithstanding manumission had taken place; titles 10 and 11 of freedmen being made or recognised as if they were free-born, and the remaining titles of supposed slaves claiming to be really free-born, and the like. This book closes the important part of the Digest formed by the law of Family and Inheritance.

Book XLI. opens with a title on the acquisition of property and appears disconnected from the preceding. In fact it is only introductory to those which follow. The real link is Possession, which begun with *bonorum possessio* in Book XXXVII. (or perhaps XXXVI. 4) and of which other phases occur in Books XLII. and XLIII. The present book treats (title 2) of acquiring and losing possession, and title 3 and subsequent titles of the acquisition of property by uninterrupted possession (*usucapio*). The first title therefore is contrasted with the second as

property to possession, and with the third and others as the acquisition of property in general to the special acquisition by means of possession.

Book XLII. thus introduced by XLI., contains a new division. Hitherto we have had the various kinds of suits. We now have (title 1) the result of the suit, viz. judgment and its effect. Title 2 is on confession, title 3 on voluntary surrender of goods, and the remaining titles on the execution of judgment by seizure (*missio in possessionem*) and sale of the debtor's property, and rescission of acts done to defraud the creditors.

Book XLIII. deals with interdicts or injunctions, which form a separate class of suits, originally more or less of a temporary and interlocutory character, directed to obtain the permission or prohibition of certain acts rather than damages for loss of property or for injury. Many interdicts are for gaining or retaining possession, and hence are connected with the matter of the two preceding books.

Book XLIV. treats of pleas, especially (title 2) the plea of the case having been already decided ; (title 3) of the statute of limitations, (title 4) of fraud and intimidation, and (titles 4 and 5) some others. The last title in the book, (tit. 7) on obligations and actions, is partly supplementary and partly introductory. It contains a brief notice of some contractual actions not before specifically treated, and some general notices on the different kinds of actions.

Books XLV. and XLVI. deal with stipulation, the only form of strict verbal obligation which remained in Justinian's legislation. Title 1 of Book XLV. is on stipulation in general ; title 2 on joint stipulations ; title 3 on stipulations made by slaves ; Book XLVI. title 1 on sureties ; title 2 on the use of stipulations to give a new valid form to existing obligations (*denovationibus et delegationibus*) ; title 3 on payments and discharge of obligations in general, and title 4 on the formal discharge of a verbal obligation ; title 5 on the stipulations directed by the praetor and then (in the three remaining titles) of three stipulations in particular ; that for safe-keeping of a ward's property, for the payment of a judgment debt, and for the ratification of an agent's acts.

It is indeed these last stipulations which appear to have attracted the general doctrine of verbal obligations to this part of the Digest. For doing justice between parties the court had sometimes not so much to give judgment on the past as to secure certain conduct for the future. Injunctions or interdicts were one mode of doing

this : another was to compel the party or parties to enter into recognisances for their own acts in future. And the recognisance was a bond, i.e. a verbal obligation entered into by the one party to the other, and confirmed by similar verbal obligations of others as sureties for them. Some of these usual stipulations were transferred by Justinian to earlier parts of the Digest from the place in the Edict corresponding to this. (See VII. 9 ; XXXVI. 3.)

Books XLVII. and XLVIII. treat of penal actions : Book XLVII. of torts, especially, titles 2—9, of thefts, and robbery of various kinds ; title 10 of insult, including libel and defamation ; and the other titles of various torts, such as violating graves, collusive conduct of a suit, disturbing boundary stones, illicit societies, &c. Some or all of these torts might also be treated as crimes, and subject the offender to punishment as well as, or in lieu of, damages. Book XLVIII. treats of crimes and criminal procedure, especially title 4 of treason ; 5 of adultery ; 6 and 7 of violence ; 8 of assassination and poisoning ; 9 of parricide ; 10 of forgery ; 11 of extortion ; 16 of false accusation. Criminal procedure is treated in some titles viz. title 2 of indictments ; 3 of the custody of the accused ; 17 of dealings with those who do not appear to take their trial ; 18 of inquiry by torture ; 19 of punishments ; 20 and 21 of dealing with the property of criminals ; 22 of banishment.

Book XLIX. titles 1—13 treats of appeal ; title 14 of the rights of the crown (*fiscus*) to escheats in certain cases ; 15 of the restoration of rights to one restored from captivity (*de postliminio*), and, this naturally having most frequently application to soldiers, we then have 16 of the position of soldiers ; 17 of the privilege accorded to soldiers of having property of their own, though otherwise in their father's power, and 18 of certain privileges of veterans.

Book L. is mainly on a part of public law, viz. title 1—12 on the administration of municipal affairs and the duties of the citizens to take their share of the burdens : title 13 on certain extraordinary jurisdiction ; 14 on brokerage ; 15 on public registers of taxable property (*de censibus*). The last two titles are collections respectively (title 16) of a large number of passages explaining the import of particular words when used in law, and (title 17) of a number of legal maxims.

The result of this examination tends to shew that while some suggestions have been adopted first from the old procedure by



statutable actions, and secondly from the Praetor's edict, the dominant idea in the arrangement is that of the order of matters to be considered in the conduct of a suit<sup>1</sup>. I. Jurisdiction, parties to the action and bars to action. II. Import of actions divided into (1) recovery of what is still your property; repair of damage; ascertainment or partition of property; (2) commercial dealings; (3) relations between husband, wife and children; (4) succession to property vacant by death. III. Judgment and Execution. IV. Injunctions, Special Pleas, Bonds and Sureties. Here ends the matter of purely civil actions. Then follow V. Punishment of Wrongs by civil action or by criminal proceedings; VI. special and public Law and Interpretation.

The principal disturbances or apparent disturbances to this order are first, three miscellaneous books, viz. Books XI., XXII. and XXXIX., and secondly the interference of other principles with the main lines. To this latter head belong (*a*) the treatment of suits for an inheritance as a whole (v. 2, 3) before suits for individual things instead of leaving them to the section on succession by death, (*b*) the attention paid to the idea of possession which, originating with the grant of possession in execution of a judgment, has probably first dictated the position of inheritance, and, through that, of other branches of family law; and secondly has led to the position of acquisition by possession and therefore of acquisition in general in Book XLI., and thirdly has placed *damni infecti* and kindred actions in Book XXXIX., (*c*) the treatment of obligations in general and verbal obligations in particular in connexion with, and as it were introductory to, the Praetorian Recognisances.

## CHAPTER IV.

### ORDER OF EXTRACTS IN THE TITLE.

HAVING discussed the order of the titles, I pass to the order of the extracts in the titles. And here we are even less assisted by any authoritative information than we were in the case of the larger division of the matter. Justinian tells us who were the Commis-

<sup>1</sup> O. Lenel's exposition of the principles of arrangement of the Edict has much which resembles and supports this view (*Edict. Perp.* pp. 9—22), but I am concerned with Tribonian, not (except indirectly) with Julian.



sioners, what was the number and quantity of the books from which the extracts were taken, their descriptions, and the large powers given to the Commissioners to deal with them. What is more than this we have to discover from the Digest itself.

The first thought, no doubt, is that each title will have been made by this kind of mosaic to contain an orderly discussion of the branch of law denoted by the title. And this idea is confirmed by our frequently finding at the commencement of the title a definition or brief description of the subject-matter or some neat division of it. And not uncommonly this is followed by some regular treatment of one or more branches of the subject. Some extracts are found, as it were, fused together into an intelligible account. Other extracts are left separate, but seem to throw light on one another, and to limit or extend the notion which each would have given singly. Few readers but must in studying a title have fancied they found, or at least have tried to find, a clue to the arrangement of the extracts in the connexion and development of the thought; and nothing can have appeared a more legitimate source of assistance in the comprehension of an extract than the train of ideas suggested by the extracts on each side of it.

Yet no long study is required before it is seen that, at least in many cases, this hope is fallacious. Neighbouring extracts are found to be in no wise specially connected, and the same extract is found to contain sometimes an orderly discussion, sometimes a collection of isolated, or at least not closely connected, points. Even if one title conforms more or less to what might be expected in the treatment of a branch of law, the next defies all attempts to justify the notion of arrangement which may have been gained from the preceding.

But Justinian left a clue to the arrangement when he (or Tribonian) directed the compilers to give with each extract a reference to the work from which it was taken. Probably all he aimed at by this means was to give to the new digest the authority which was still justly attributed to the lawyers, whose writings were used. The law, which Justinian gave and meant to give, was the law sanctioned by his predecessors, recognised by custom, and illustrated by writers of renown: it was the old law, but purified, amended, made accessible to all students and practitioners, and suitable to the needs and habits of the time. But these references have been found in fact to have a further value. On patient examination they reveal the

mode in which the compilers went to work. The inscriptions, as they are called, attracted the attention of Augustin and others in the sixteenth century, but it was reserved for Friedr. Bluhme in a masterly essay (of which the learning, thoughtfulness, and composure are very striking for a young man of only twenty-three years of age) to solve the problem in a manner which has since met with all but universal acceptance<sup>1</sup>. This essay was published in 1820 in Savigny's *Zeitschrift für gesch. Rechtswiss.* Vol. iv.<sup>2</sup>

On examining the inscriptions in any title containing a large number of extracts it will be noticed that the extracts from each work, say for instance Ulpian's Commentary on Sabinus, follow each other in the order of the work itself. Take the last title in the Digest (L. 17, *de diversis regulis*); the second extract is from the first book of Ulpian's commentary, the third extract is from the third book, the fourth extract from the sixth book, the sixth extract from the seventh book, the ninth extract from the fifteenth book, the thirteenth extract from the nineteenth book, and so on, the intermediate extracts being from other works, which again are quoted in their own order. Further, if the different works, from which extracts are made in this title, are taken in the order in which they occur in this title, and this list of works be compared with the works from which extracts are made in another title (say that *de uerborum significatione*, L. 16), it will be seen that, so far as the same works occur at all, there is a great similarity in the order, accompanied with certain differences which, when the comparison is extended to several titles, assume a marked character, clearly not accidental. The works are seen to be grouped in three large masses and one smaller one. In each of these groups the order of works is in the main the same in each title (so far as it contains extracts from these works at all), but the groups themselves change their positions. Thus in XLV. 1, the order of these groups may be represented by *A B C c*; in L. 16, it becomes *B A c C*; in L. 17, *A c C B*. (*C c* or *c C* will be generally treated as one group, of which a small number of works are sometimes suffixed, sometimes prefixed, to the bulk of the group.) On carrying the examination throughout the Digest it is found that

<sup>1</sup> F. C. Schmidt in his well-written work, *Methode der Auslegung der Justinianischen Rechtsbücher*, 1855, §§ 30—36, is an exception. But his objections and illustrations are quite inadequate, and not in themselves maintainable.

<sup>2</sup> He published separately an essay on the repetitions in the Digest (*De geminatis &c.*, Jenae, 1820).

these groups are persistent, but that there are, on the whole not unfrequently, slight displacements of the order of the works in the several groups, and intrusions of one or more extracts from one group into the midst of another group. The most noticeable displacements are of two kinds, first, the alternation of some works with others of similar contents, and secondly, the displacement of a few extracts from their regular order to the commencement of the title, where they form a sort of introduction to the subject. These facts clearly suggest a theory of the course of proceedings followed by the compilers, which may be illustrated by considering the natural probabilities of the case.

A long task, a short time, and a large body of Commissioners naturally lead to division of the work. The work to be done was, in this case, first the reduction of the large mass of writings of lawyers of recognised authority into a manageable compass, by the omission of what was obsolete, the decision of disputes, the removal of contradictions and repetitions, and then the consolidation of the matter into fifty books under titles selected from the Code or the Perpetual Edict. To divide the Commissioners into committees and to assign to each committee a fair share of the treatises to read and manipulate seems an obvious course. The task of removing repetitions and contradictions would be greatly facilitated, if works dealing with the same subject-matter were assigned to the same section and were read and examined in connexion with one another. Doubt would be sure to arise as to the precise title (the Code contains 765) to which any part of the book which they were reading should be referred, and whether it would be better to make longer and more continuous extracts with fewer titles, or shorter extracts under more numerous titles. Such points would be more capable of at least a provisional solution, if each committee worked first on some comprehensive work or works which kept before them the extent and connexion of the matter. And it would probably be thought advisable to select for this purpose the latest of the important authors, as shewing most completely what opinions had met most general acquiescence, and what contradictions and disputes still remained for decision. The Roman writers on law were evidently in the habit of quoting largely from their predecessors (as was indeed almost necessary at a time when books were all manuscript and copies therefore rare and costly), and thus a later work might well give not only a general account of the matter from the writer's own point of view, but also



an account of the different views and illustrations of others. After each committee had done its own work the consolidation of the whole would have to be undertaken. Sometimes no doubt the division of subject-matter would be so clean, or the matter itself so scanty, that the title would remain unaltered from the form in which it left the committee. But few writers are so logical in their divisions and so stern in restricting their discussion, that under each head only that matter is found which is suitable there and not suitable elsewhere. Certainly such was not the character of the Roman jurists: they treated in the same book questions which are fruitfully discussed under more than one head. The result would be that all the committees would have contributions to make to many titles. The easiest way to compose what was ultimately to form a title of the Digest would be to put the several contributions one after the other, without attempting any arrangement of the fragments according to their meaning. But the same process of striking out repetitions and contradictions would have to be gone through with the title as a whole, which each committee had gone through with its own part.

This account of what, considering the instructions and the nature of the material, would be *a priori* probable, or at least very possible, fits in with what has been gathered from an attentive examination of the Digest, especially of the inscriptions. It is hardly therefore an assumption to say that this is what was done. Tribonian divided his Commission into three committees and the books to be extracted into three groups, or masses. The first group is headed by Ulpian's commentary on Sabinus; the second group by two-thirds of Ulpian's commentary on the Edict, viz. the first third and the last third; the third group is headed by Papinian's works. From a comparison of the commentaries on Sabinus by Ulpian, Paul, and Pomponius, we can see that the subject-matter of Sabinus must have been, speaking generally, inheritance, consensual contracts, family law, theft, conditions, stipulations and perhaps some other matters, but the evidence is conflicting<sup>1</sup>. The part of the commentaries on the Praetor's Edict which dealt with the same heads of law, i.e. the middle third, was given to the same section. The Sabinian group then would contain the principal materials for Books XII.—XL. and a good proportion of Books XLV.—L. The Edictal group would contain the principal materials for Books II.—XI. and XLI.—XLIV. and a proportion of the

<sup>1</sup> See Leist's *Versuch einer Geschichte des römischen Rechtssystem* (1850) p. 44 sqq. and table appended: also account of Sabinus, below ch. x.



final books. Of Justinian's Parts, Parts I. II. would belong to the Edictal group, Parts III.—V. to the Sabinian group, Parts VI. and VII. were divided between them. The Sabinian group stood relatively in a closer relation to the old civil law, the Edictal group to the praetorian law. The Papinian group would be supplementary to both. It is noticeable that these groups correspond to the course of study in the law schools before Justinian reformed it. The first year's course (marriage, guardianship, inheritance) and part of the second year's course in alternate years (commercial contracts) are included in the Sabinian group; the constant part of the second year's course, viz. Procedure (Pars I. = Books I.—IV. of Digest), and actions for the recovery of property, which alternated with commercial contracts for the second year's course, are included in the Edictal group; the constant part of the third year's course (Papinian) and the fourth year's study (Pauli Responsa) were included in the Papinian group. Among the compilers were four Professors of Law, who may naturally be supposed to have been allotted to the group principally treated in their lectures.

Besides the works already mentioned each group contained some other important treatises and a number of smaller writings on special points of law. It would seem that these smaller writings were allotted to the three committees more to make an equal distribution of the mass to be dealt with than from any strict division of subject-matter. A complete list of the works extracted is given in Appendix B. It shews the distribution between the several committees, the order in which the works were taken, and the subordinate groups of works dealt with at the same time, so that parts of the one work were taken before parts of the others, as if they had been separate works. For instance the whole of Ulpian's commentary on the Urban Edict does not precede the whole of Paul's commentary, nor do these two precede the whole of Gaius' commentary on the provincial Edict; but, beginning with the first six books of Ulpian, with the first five of Paul, and with the first of Gaius, we then go on to the seventh book of Ulpian, the sixth and seventh of Paul, and the second of Gaius, and so on. Thus of the Sabinian group there were taken together, and broken up into smaller groups, the commentaries on Sabinus, those on the middle part of the Edict, the various books of Institutes, the books on Adultery, the collections of Rules and the books on Appeals. Of the Edictal group there were broken up and grouped in sections the commentaries on the Edict, the

books on Plautius, the Digests of Celsus and Marcellus, the books on the Julian and Papian law, and others. Of the Papinian group the *Quaestiones* of Paul and Scaevola, the answers of Paul and Scaevola, the books on Trusts, the *Receptae sententiae* of Paul with the Epitome of Hermogenian, and others were respectively grouped.

Out of nearly 230 works bearing separate titles, extracts from which appear in the Digest, a small number have composed the bulk of the Digest. The works first taken in hand were large and comprehensive treatises or collections, and naturally extracts from them rendered it superfluous to make many or large extracts from most of the others, except on special points. Hommel has rearranged all the extracts under the head of the works from which they were taken, and although from the necessity of the case his book falls far short of justifying its ambitious title as a 'New birth of the Old Law-Books' (*Palingenesia librorum iuris veterum*, Lipsiae, 1767) it is convenient for many purposes, and affords us a ready means of determining the proportion in which each work and each author has been made to contribute to the Digest. (See App. C.)

The extracts from Ulpian's commentary on the Edict form between a fourth and a fifth, or, if we add his *Libri ad Sabinum*, nearly one-third of the whole Digest. If we add to these the like treatises of Paul, Pomponius' books on Sabinus, Julian's *Digesta*, Gaius' commentary on the Provincial Edict, Papinian's *Quaestiones* and *Responsa*, and Scaevola's *Digesta*, we have one half of the Digest. Six more works, viz. Ulpian's *Disputationes*, Paul's *Quaestiones*, *Responsa* and books *ad Plautium*, African's *Quaestiones* and Scaevola's *Responsa*, making sixteen works by eight authors, raise the proportion to nearly two-thirds. About twice this number, or thirty-three works by sixteen authors give four-fifths of the whole Digest. The remaining one-fifth is contributed by nearly 200 treatises, none of which however have supplied extracts sufficient to fill much more than four pages of Mommsen's stereotype edition, and some of which have supplied only two or three lines.

The proportion of extracts supplied by each of the three groups is estimated by Bluhme approximately as the numbers 5 for the Sabinian group, 4 for the Edictal group, 3 for the Papinian group. The thirty-three important works, which, as I have stated, furnish together four-fifths of the Digest, are distributed between the groups as follows. I have added my estimate of the pages of Hommel

respectively occupied by them. The order of extraction is preserved, the works dealt with simultaneously being bracketed.

SABINIAN GROUP :		Hommel's pages
{	Ulpiani <i>Libri ad Sabinum</i> . . . . .	130
{	Pomponi     "      "      . . . . .	37
{	Pauli       "      "      . . . . .	31
{	Ulpiani <i>Libri</i> XXVI.—LI. <i>ad edictum</i> . . . . .	125½
{	Pauli <i>Libri</i> XXVIII.—XLVIII. <i>med.</i> . . . . .	26
{	Gai <i>Libri</i> IX.—XVIII. <i>ad edictum provinciale</i> . . . . .	14
	Ulpiani <i>Disputationes</i> . . . . .	25
	Ulpiani <i>Opiniones</i> . . . . .	9½
	Iuliani <i>Digesta</i> . . . . .	58
	Africani <i>Quaestiones</i> . . . . .	23½
	Marciani <i>Institutiones</i> . . . . .	16½
	Ulpiani <i>Libri de officio proconsulis</i> . . . . .	15
		— 511

EDICTAL GROUP :		
{	Ulpiani <i>Libri</i> I.—XXV.; LII.—LXXXI. <i>ad edictum</i> . . . . .	216½
{	Ulpiani <i>Libri ad edictum aedilium curulium</i> . . . . .	10½
{	Pauli <i>Libri</i> I.—XXVII.; XLVIII. <i>med.</i> —LXXVIII. <i>ad edictum</i> . . . . .	66
{	Gai <i>Libri</i> I.—VIII.; XIX.—XXX. <i>ad edict. provinciale</i> . . . . .	19
	Pauli <i>Libri ad Plautium</i> . . . . .	22
{	Celsi <i>Digesta</i> . . . . .	14
{	Marcelli <i>Digesta</i> . . . . .	16
	Modestini <i>Excusationes</i> . . . . .	8
	Modestini <i>Responsa</i> . . . . .	11
	Iavoleni <i>Epistulae</i> . . . . .	9
	Pomponi <i>Libri ad Q. Mucium</i> . . . . .	13½
	Callistrati <i>Libri de cognitionibus</i> . . . . .	9½
	Ulpiani <i>Libri ad legem Iuliam et Papiam</i> . . . . .	8
		— 423

PAPINIAN GROUP :		
	Papiniani <i>Quaestiones</i> . . . . .	45
	Papiniani <i>Responsa</i> . . . . .	40
{	Pauli <i>Quaestiones</i> . . . . .	29
{	Scaevolae <i>Quaestiones</i> . . . . .	9
{	Pauli <i>Responsa</i> . . . . .	20
{	Scaevolae <i>Responsa</i> . . . . .	20



		Hommel's pages.
Ulpiani	<i>Fideicommissa</i> . . . . .	17
{Pauli	<i>Sententiae</i> . . . . .	15
{Hermogeniani	<i>Iuris epitomae</i> . . . . .	9½
Tryphonini	<i>Disputationes</i> . . . . .	18½
		<hr/> 223

## APPENDIX TO PAPINIAN GROUP:

Scaevolae <i>Digesta</i> . . . . .	44
	<hr/> 1201

N.B. The total number of extracts in the Digest occupy about 1510 of Hommel's pages.

The group called Appendix to the Papinian group, and which is found sometimes to precede the bulk of that group, sometimes to follow it, contains one very important work, Scaevola's Digest, and also some books of Labeo abridged by Javolenus, and by Paulus. It is probable that they were discovered later than the rest, and given out, probably to the Papinian Committee, separately from the other works assigned to them.

Another case of indecision is shewn by the position of some books of Ulpian's, and the others' Commentaries on the Edict. The whole of Books 52—81 of Ulpian's were given to the Edictal Committee, but they were extracted in this order: Books 56—81, then the Commentary on the Aediles' Edict, then Books 54, 55, and lastly Books 52, 53. Possibly these books 52—55 were originally assigned to the Sabinian Committee, and they being overworked eventually passed them on to the Edictal Committee. But it is very likely that the subject-matter had something to do with it. Book 52 (besides treating of the security to be given to the legatee) dealt with *operis novi nuntiatio*; Book 53 with *damni infecti* and *aquae pluviae arcendae*; Books 54, 55 with claims to freedom and with the *publicani*. These are just matters of which the position in the Digest is somewhat difficult to account for. See what is said of Dig. xxxix. and xl. above p. xliii. The position of the Commentary on the Aedile's Edict in the order of extracting probably indicates that that Edict was by Julian made an Appendix to the Praetor's Edict. (Hence the Florentine Index gives the number of Ulpian's books on the Edict as 83, and of Paul's as 80.)

If we turn for a minute from the works to the authors it may be noted that the extracts from Ulpian's various works are in bulk 39 per cent. of the whole Digest. Paulus has nearly 18 per cent.; Papinianus, Scaevola, Pomponius, Julianus and Gaius have together more than 24 per cent.; Modestinus, Marcianus, Africanus, Javolenus and Marcellus  $9\frac{1}{2}$  per cent.; Tryphoninus, Callistratus, Celsus and Hermogenianus nearly 4 per cent. Thus the sixteen authors of the thirty-three works mentioned above have, when their other works are taken into account, supplied  $94\frac{1}{2}$  per cent. of the whole. The remaining  $5\frac{1}{2}$  per cent. was supplied by extracts from 22 writers.

If we make a chronological division, classing as older writers all down to and inclusive of Gaius, and as later writers the rest, beginning with Uenuleius and Marcellus, one-fifth of the Digest is taken from the older writers and four-fifths from the later. The Republican writers (Q. Mucius, Aelius Gallus) and the other writers before Trajan (Alfenus, Labeo, Proculus) are insignificant in bulk (not 2 per cent. of the whole): the writers after Alexander Severus, or at any rate after Gordian (Hermogenianus, Arcadius) are doubly insignificant (not we may safely say 1 per cent.). Over 95 per cent. of the Digest was originally written from cir. 100 to 230 A.D.

Such then being the authors and works used, what is the nature of the Digest as revealed by the observed order? Clearly it is not a systematic treatise on each separate head of law, composed after consultation of these authorities. Nor is it a skilful mosaic in which fragments carefully selected from these works are disposed, each in the place and order calculated to give the effect of original treatment, because permeated with consecutive thought. It is simply the result of taking the selected treatises and arranging them, partly in one line, partly in parallel lines, and then as it were squeezing them together, so as to throw out what was antiquated or superfluous, and leave only what was practical, with no more repetition than was needed for clearness. Where Ulpian, Pomponius and Paul had treated the same matter, the most comprehensive, usually Ulpian, sometimes Paul (e.g. D. XLI. 2), was made the groundwork, and the others were either dovetailed into it or clipt and appended. The larger treatises being exhausted, supplementary remarks or illustrations were taken from the multifarious string of minor works which each committee had received for examination. The same process was repeated when the contributions of the three committees were combined, but there is less fusing of the extracts together: the

largest and most important string of extracts being put first, the other two contributions were clipt and appended.

But there are, as has been said and as would naturally result from such treatment, signs of the operations of the compilers having been in a limited degree guided by the connexion of thought. First, not unusually some extracts are taken from the regular order of the works and placed at the beginning of the title as an introduction (see ll 1—6 of this title). Secondly, some extracts have been evidently mutilated so as to form part of a sentence in another extract from a different work (see e.g. l 8; l 14; l 16; l 69 of this title, and especially III. 3; IV. 3 *passim*). Thirdly, successive extracts are connected by particles, e.g. *quodsi, uero, autem, enim, ergo, &c.*, which may or may not have been in the original work, but at any rate have, it is fair to suppose, been either left there or inserted there on purpose to connect the meaning of the two fragments. Fourthly, repeated alternation of extracts from the same books indicates the selection or compression of the one with an eye to the other. Where there is no such connexion visible, we should not be justified in imagining that the compilers intended to imply any connexion in thought between two successive extracts, unless one at least of the extracts is found in a different part of the title from that which the known order of the treatises would assign to it. And even if it is found in such an abnormal position, we cannot at once conclude that the law given in the extract is meant to be explained or qualified or supplemented by the adjoining extracts or *vice uersa*. The position may be merely accidental—a slip of the compilers or their copyists, a consequence of the exigencies or convenience of the work. For there is no ground for thinking that the compilers set any special value on preserving the order. The order, which we observe, is one which was natural for them to fall into, but not one thoughtfully adopted and religiously retained and protected. They struck out parts of the manuscripts before them, amended the rest where necessary, and gave them to be copied one by one or section by section as they finished with them.

But even when we can see some design in the displacement of a fragment, it is not always a design of real importance for the interpretation of the law. The connexion may be due to a much slighter cause. Thus Bluhme (p. 293) suggests that the extract from Papinian forming l 33 of our title has been put out of its place, merely because Julian is mentioned, and the position thus serves to introduce the



extracts from Julian's own works. Possibly Papinian had quoted the part of Julian which the compilers have given from the original. In D. i. 6 the extract from Gaius (l 1) is interrupted in order to give the full text of Pius' rescript, and for this purpose Ulpian's book *de off. procons.* is resorted to (l 2). Again Bluhme suggests that ll 5—8 of D. xxxiii. 6 have been placed after l 4 merely because they, like l 4, speak of quantity, not quality, of wine, oil, &c. contained in a bequest. In fact a disturbance of order may be due to accident or temporary forgetfulness, or may be due to design, but design may be moved by only a superficial resemblance or by an external connexion. Justinian appears to have hurried the Commissioners in order to signalize his third consulship with the additional distinction of the publication of the Digest (Const. *Tanta* § 23). Bluhme (p. 372) notes that the later books of the Digest contain less evidence of comparison of the work of the three sections than the earlier books do—a fact which the compilers' weariness or Justinian's haste may well account for. The titles containing most disarrangement of the order are, according to Bluhme, i. 3, 5, 7. In Book xx. the desire to put Papinian first has avowedly (Const. *omnem* § 4) been the main motive. Thus the extract from Gaius now standing fourth was clearly intended originally to head the first title of that book.

Under the light thrown by Bluhme's discovery the Digest assumes a different aspect to what might otherwise be taken. The internal connexion of thought was not the motive of the arrangement, and the arrangement cannot therefore be made the guide of interpretation. What connexion of thought there is comes mainly from the compilers having taken as the foundation several systematic works, compared them with one another, and given us blocks of them pared away to avoid repetitions. These blocks may coincide with a natural division of the subject-matter, or may contain parts of two or more sections, or may be merely a string of disconnected cases on different parts of the subject. Mommsen's edition, like some other modern editions, prints each fragment continuously and separates successive fragments. This is quite right when the composition of the Digest has to be shewn. I have however thought it advisable to distinguish in the printing the parts of some fragments and to join together some separate fragments, the order however being preserved. A rearrangement of the matter in each title of the Digest, so as to make an orderly discussion, has been executed by Pothier, but the result is not very satisfactory ;

the difficulty of reference is considerable; and we have a subjective instead of an objective basis to rest on.

As an illustration of the compilers' work, we may examine the order in our present title. The first six fragments are from the work of different committees. Of these the first two are from the Edictal series; 1 3 is from the Sabinian series; 1 4 from the Edictal series, 1 5 from the Papinian, and again 1 6 from the Edictal. Moreover 1 4, 6 are from an earlier part of the Edictal series than 1 1 and 2. On examination it is clear that these six fragments have been arranged so as to form an introduction, containing definition, character, mode of constitution, acquisition and loss. With 1 7 we begin the extracts from Ulpian *ad Sabinum* which form the bulk of the title. Ulpian's seventeenth book is interrupted by short interpolations (1 8) from the fortieth book of his commentary on the Edict (one of the Edict books assigned to the Sabinian Committee), and from Pomponius' fifth and Paul's third book *ad Sabinum*. L 11 is from Paul's epitome of Alfenus, also in the Sabinian series. L 15 begins the eighteenth book of Ulpian *ad Sabinum*, which is similarly interrupted. L 21 and 1 23 are interpolations from the seventeenth book of Ulpian, which had evidently been postponed on account of the fuller treatment of the subject of acquisition by slaves in the eighteenth book. There is also an interpolation, 1 24, from the tenth book of Paulus *ad Sabinum*, i. e. a later book than would naturally be taken with Ulpian's eighteenth book. Then follows another extract from Paul's tenth book *ad Sabinum*, which, if the connexion of thought had been regarded, must have been placed after 1 23 or in some such place. It is put here simply because it was extracted after Paul's third book, and before Julian. The like reason accounts for 1 32. Then comes a curious interpolation from the Edictal series, viz. an extract from Papinian for which Bluhme, as I have said, accounts by the reference in it to Julian. Extracts from Julian, African, Marcian, Ulpian's Rules and Neratius follow in due order: but (1 39) an extract from Gaius *ad Edictum provinciale* (one of the Edictal series) is fused with Marcian. We then proceed in 1 45 with the Edictal series, and the first here is another extract from the same book of Gaius. Evidently the Edictal series has been made slightly to overlap the end of the Sabinian, and thus 1 39 has been squeezed into the Sabinian group instead of following 1 44. The extracts from the books on Plautius and from Paul's edition of Vitellius duly follow. After 1 50 should

have come the other extract from the same third book on Vitellius and an extract from Celsus which have been transferred to head the title (ll 1, 2). Modestin's various works and Pomponius *ad Q. Mucium* follow duly. An extract from Gaius *ad Edict. prou.* follows. According to the Florentine ms. it is from the seventeenth book, and if so, belongs to the Sabinian series, but the inferior mss. give the seventh book, and then it belongs to the Edictal series, and is an after-thought of the Edictal compilers, not an intermixture of the two series. With l 57 begins the Papinian series, the extract from the *Quaestiones* having been already taken to make l 33. The series duly extends to l 63. After this comes a number of extracts from the Sabinian series interrupted by l 65 and l 71, and concluded by l 74 from the Edictal section. And this collection is composed of two sets of extracts, ll 64—67 and ll 68—73, the former set consisting of extracts from the books on the Edict and a treatise of Julian's, the latter of extracts from Ulpian's seventeenth book and Pomponius' fifth book *ad Sabinum*. In the order of extraction by the Sabinian Committee, the latter set would precede the former. It is difficult to find any reason for this recurrence of Sabinian extracts at the end of the title and in an inverted order. Probably they were intended for insertion in another title, and have thus fallen out of their normal position. Certainly the connexion of thought can have had nothing to do with this postponement and with the arrangement as we now have it.

If the connexion of thought had been the ruling principle the arrangement in our title is inexplicable. Why should ll 18—20 be put where they are, instead of being partly put amongst the other miscellaneous extracts and partly interpolated in appropriate places? Why separate l 10 from l 48. § 1? and why connect the latter with l 48. § 2, except because they were, after perhaps divers omissions, left continuous in the book from which they were taken? And the same may be said of the present continuity of l 19. pr. and l 19. § 1. Surely l 12. pr., l 18, l 19. § 1, l 59 ought to come together; and so also l 7. § 2 fin. with l 27. § 3 and l 52; and l 44 with l 7. § 3; and so on.

In some titles the three series occur twice over. Books xxx.—xxxii. are as it were one title. The Sabinian mass (with a considerable number of interpolations from the others) occupies Book xxx. Book xxxi. as far as l 63 is Edictal. The rest of xxxi. and the first 42 extracts of xxxii. are Papinian and post-Papinian.



Then we recommence with Sabinian l 44—l 75; Edictal l 76—l 90; Papinian l 91 to end. Evidently these last extracts (xxxii. l 44 to end) were intended to form a separate title *de uerborum et rerum significatione*, as in the Code vi. § 8 such a title immediately follows the title *de legatis*. So the title *de ritu nuptiarum* (D. xxiii. 2) has what was intended for two titles, ll 1—51 corresponding to Cod. v. 4, and the rest corresponding to Cod. v. 5, *de incestis et inutilibus nuptiis*. The three series occur twice over here, as they do also in i. 3, where l 32 to end appears to have been meant for a title *de consuetudine*; in xxi. 2, where l 13 to end may have been for a separate title *de duplae stipulatione*; and in xxxiv. 2, where the three series recommence at l 19, Bluhme suggests that *uestimenta* and *ornamenta* seem the principal matters in the former part of the title, and *aurum* and *argentum* in the latter. In other titles one mass only is repeated, e.g. D. xxxiii. 7, where the Papinian mass occurs first in ll 2—7, and then again ll 19—29. Our title appears to be another instance, though not expressly mentioned by Bluhme under this head.

In the long title *de uerb. obl.* (xlv. 1) the first hand of the Florentine MS. has put a new rubric τὸ Β τοῦ *de uerborum obligationibus* after l 47, and a similar one Γ after l 122, thus dividing the title into three unequal portions. It is noticeable that the first section thus terminates with the extracts from the books on Sabinus; the second begins with the books on the Edict which were taken by the Sabinian Committee, proceeds with the Edictal series and with Papinian's *Quaestiones* and *Responsa*, and ends with a long extract from Scaevola's Digest: the third section has the rest of the Papinian series. This looks as if the division in the Florentine MS. witnessed to some minor distribution of work among the committees.

## CHAPTER V.

### COMPARISON OF EXTRACTS WITH THEIR ORIGINALS.

IF Justinian's Commissioners had adopted a different course and compiled each title as a systematic account of the subject-matter, using such materials as they found, but welding them into a new mass, regardless of preserving the words or identity of the authors,

they would have produced what would at first sight have been better for practical purposes and more worthy of the idea of a scientific digest of the law. But we should have been much worse off. We should have had the law as conceived by Byzantine lawyers in the sixth century instead of numerous, often large, extracts mutilated and disarranged, but still preserving much of the practical results and of the characteristic form of the writings of the most brilliant period of Roman Jurisprudence. So far as they used the writings of the old lawyers the work might yet have been valuable, as we can see from Justinian's Institutes, but the historical interest would have largely suffered. If the compilers had been at liberty to compile as they pleased and give no authorities, we should have had much less of the old lawyers than we have, thanks to Tribonian's direction to preserve the names of the authors and to the compilers' method of giving the extracts (at least usually) in the order in which they extracted them. But the question still remains, how far have these extracts been altered by the Commissioners? Justinian gave large powers of correction, and was so stringent in forbidding any comparison of the result with the originals, that we might be sure *a priori* that these large powers were used. A comparison of Justinian's Institutes with Gaius (as made in Gneist's *Syntagma*) is not good evidence on this point, because the procedure there was not strictly analogous to that in the case of the Digest. The Institutes were to be a new work, and only a general acknowledgment was made to Gaius and others. The Digest was to be a consolidation of the old lawyers' writings, corrected and compressed. It is well therefore to compare<sup>1</sup> the passages of the old lawyers which have been independently preserved to us, with the form which they have assumed in the Digest under the manipulation of Justinian's Commissioners. The comparison is not reassuring. Amendment of the law, decision of controversies, omission of repetitions and of obsolete matters were the duty of the Commissioners, and could not but largely alter the shape of the material. It is clear from this comparison that they *have* often largely altered it. Though much of the writing of the old jurists is left us in the Digest, and some passages coincide precisely with the words otherwise preserved to us, it is yet somewhat hazardous to say of any fragment, where we have not

<sup>1</sup> Something of this kind has been done, not very satisfactorily, by Istrich, *Quomodo versati sint compilatores Dig. &c.* 1863. I have taken one reference from it.

independent evidence of its being a faithful extract, that it represents exactly the view of the author, and still more hazardous to say that it represents his mode of stating it<sup>1</sup>. And unfortunately the independent evidence that we have covers the merest fraction of the Digest. The Vatican Fragments (first published 1823), Gaius' Institutes, the *Collatio Mosaicarum et Romanarum Legum*, and Paul's *Sententiae*, are almost our only independent sources. And most of the passages thus comparable (I count over 80 in all) are very short. I append a comparison of the more important passages and of some of the smaller ones, which bear characteristic traces of Tribonian's 'short method'. The parts printed in Roman letters are those which Tribonian has left unaltered. The parts printed in Italic letters shew the alterations. Consequently in the left hand column italics represent what Tribonian has omitted; in the right hand column what he has added or substituted.

In considering these extracts it is desirable to remember that partly by the effect of time, partly by imperial constitutions and especially by those which Justinian issued for the express purpose of preparing the Digest, changes had taken place which necessitated large alterations or omissions. The following are the most important. The abolition of *Latinitas* and granting of full citizenship to all freemen whether Italians or foreigners (D. I. 5. 1 17<sup>2</sup>; Cod. VII. 5, 6); the gradual extinction of *mancipatio* and *in iure cessio* (p. 36); the consolidation of *usucapio* and *longi temporis possessio* (p. 138); the abolition of the distinction between land in Italy and in the provinces; the disuse of the forms of marriage which made the woman pass into the power of her husband (p. 163); the abolition of *fiducia*, and amalgamation of *pignus* and *hypotheca* (p. xxxix); the abolition of *sponsores* and *fidepromissores* leaving only *fideiussores*; the abolition of *adstipulatores*; the extinction of the old *litterarum obligatio*; the large reforms in the law of wills, *cretio* (Cod. VI. 30. 1 17), and all distinction between the several kinds of legacies being abolished, and

<sup>1</sup> Compare for instance xxxii. 1 55 with L. 16. 1 167. Ofilius' authorship is suppressed, and Ulpian's arrangement, as shewn by the former extract, is altered in the latter. On the general question Puchta makes some remarks, *Cursus* § 104, with Rudorff's notes *nn*.

<sup>2</sup> While Caracalla made all freemen Roman citizens, we find in Ulpian, Paul, and the Theodosian Code *Latinitas* &c. treated as still subsisting. The most satisfactory explanation is that Caracalla gave citizenship to all Roman freemen of inferior status at the time but did not prevent such growth of *Latinitas* and *Peregrinitas* as arose from informal manumission, or from punishment &c. Cf. Zimmern § 123; Walter § 352; Kuntze § 326: &c.



legacies and *fideicommissa* being put on the same footing, accompanied by the greatest freedom which either possessed before; the consolidation of the *S.Cta Pegasianum* and *Trebellianum*; the alterations in the course of intestate succession; the practical repeal of the *lex Cincia* and of the *Iulia* and *Papia Poppaea*, and finally the change of the judicial system under Diocletian by which the *formulae* and much of the consequent language passed away.

Another cause of omissions may be found in the directions of Justinian (Const. *Deo auctore*, § 9) that matter already placed in the Code should not be repeated in the Digest. How far these directions were observed we do not know. It is possible that Tribonian may have allowed much to stand in the Digest, which he would have omitted, if he had not contemplated the revision of the Code, which was afterwards carried into effect. Of this we have no means of judging. (See however Const. *Cordi*, §§ 1—3.)

Gai. Inst. i. 48—55.

Sequitur de iure personarum alia diuisio. *Nam* quaedam personae sui iuris sunt, quaedam alieno iuri subiectae sunt. *Rursus earum personarum quae alieno iuri subiectae sunt, aliae in potestate, aliae in manu, aliae in mancipio sunt.* Uideamus *nunc* de his quae alieno iuri subiectae sint. Si cognoverimus quae istae personae sunt, simul intellegemus quae sui iuris sint. *Ac prius* dispiciamus de iis qui in aliena potestate sunt. In potestate *itaque* sunt serui dominorum. Quae quidem potestas iuris gentium est: nam apud omnes peraeque gentes animaduertere possumus dominis in seruos uitae necisque potestatem esse; et quodcumque per seruum acquiritur id domino acquiritur. Sed hoc tempore *neque ciuibus Romanis nec ullis aliis* hominibus qui sub imperio *populi* Romani sunt, licet supra modum et sine causa in

Dig. i. 6. 1 1.

Gaius libro primo institutionum.

De iure personarum alia diuisio sequitur, *quod* quaedam personae sui iuris sunt, quaedam alieno iuri subiectae sunt.

Uideamus *itaque* de his quae alieno iuri subiectae sunt: *nam* si cognoverimus quae istae personae sunt, simul intellegemus quae sui iuris sunt. Dispiciamus *itaque* de his quae in aliena potestate sunt. *Igitur* in potestate sunt serui dominorum. Quae quidem potestas iuris gentium est: nam apud omnes peraeque gentes animaduertere possumus dominis in seruos uitae necisque potestatem *fuisse*; et quodcumque per seruum acquiritur, id domino acquiritur. Sed hoc tempore nullis

hominibus qui sub imperio Romano sunt, licet supra modum et sine causa *legibus cognita* in

seruos suos saeuire. Nam ex constitutione *imperatoris* Antonini qui sine causa seruorum suorum occiderit, non minus *teneri* iubetur quam qui alienum seruorum occiderit. Sed et maior *quoque* asperitas dominorum per eiusdem principis constitutionem coercetur: nam<sup>1</sup> *consultus a quibusdam praesidibus prouinciarum de his seruis qui ad fana deorum uel ad statuas principum confugiunt, praecepit, ut, si intolerabilis uideatur dominorum saeuitia, cogantur seruos suos uendere. Et utrumque recte fit: male enim nostro iure uti non debemus; qua ratione et prodigiis interdicitur bonorum suorum administratio. Ceterum*<sup>2</sup> *cum apud ciues Romanos duplex sit dominium, (nam uel in bonis uel ex iure Quiritium uel ex utroque iure cuiusque seruus esse intellegitur), ita demum seruum in potestate domini esse dicemus, si in bonis eius sit, etiamsi simul ex iure Quiritium eiusdem non sit: nam qui nudum ius Quiritium in seruo habet, is potestatem habere non intellegitur. Item in potestate nostra sunt liberi nostri quos iustis nuptiis procreauimus: quod ius proprium ciuium Romanorum est.*

Gai. *Inst.* i. 98—107.

Adoptio autem duobus modis fit, aut *populi* auctoritate aut imperio magistratus uel<sup>3</sup> *praetoris*. *Populi* auctoritate adoptamus eos qui sui iuris sunt: quae

seruos suos saeuire. Nam ex constitutione *diui* Antonini qui sine causa seruorum suorum occiderit non minus *puniri* iubetur, quam qui alienum seruorum occiderit. Sed et maior asperitas dominorum eiusdem principis constitutione coercetur.

(1 2)

1 3. Gaius libro primo institutionum.

Item in potestate nostra sunt liberi nostri quos *ex* iustis nuptiis procreauerimus: quod ius proprium ciuium Romanorum est.

Dig. i. 7. 1 2.

Gaius libro primo institutionum. *Generalis enim* adoptio duobus modis fit, aut *principis* auctoritate aut magistratus imperio.

*Principis* auctoritate adoptamus eos qui sui iuris sunt: quae

<sup>1</sup> In place of this paragraph the Digest contains an extract from Ulpian which gives the rescript of Antoninus at length.

<sup>2</sup> This is wholly omitted in the Digest because the distinction was abolished by Justinian. See Cod. vii. 25.

<sup>3</sup> *Veluti* Stud. *Velut* Huschke.

species adoptionis dicitur adrogatio, quia et is qui adoptat rogatur, id est interrogatur, an uelit eum quem adoptaturus sit iustum sibi filium esse, et is qui adoptatur rogatur an id fieri patiatur; *et populus rogatur an id fieri iubeat*. Imperio magistratus adoptamus eos qui in potestate parentium sunt, siue primum gradum liberorum optineant, qualis est filius et filia, siue inferiorem, qualis est nepos neptis, pronepos proneptis. *Et quidem illa adoptio quae per populum fit, nusquam nisi Romae fit<sup>1</sup>; ad<sup>2</sup> haec etiam in provinciis apud praesides earum fieri solet. Item per populum feminae non adoptantur, nam id magis placuit<sup>3</sup>; apud praetorem uero uel in provinciis apud proconsules legatumue etiam feminae solent adoptari. Item inpuerem<sup>4</sup> apud populum adoptari aliquando prohibitum est, aliquando permissum est: nunc ex epistula optimi imperatoris Antonini quam scripsit pontificibus, si iusta causa adoptionis esse uidebitur, cum quibusdam condicionibus permissum est. Apud praetorem uero, et in provinciis apud proconsulem legatumue cuiuscumque aetatis<sup>5</sup> adoptare possumus. Illud uero utriusque adoptionis commune est, quia et hi qui generare non possunt, quales sunt spadones, adoptare possunt. Feminae<sup>6</sup> uero nullo modo adoptare possunt, quia ne quidem naturales libe-*

species adoptionis dicitur adrogatio, quia et is qui adoptat rogatur, id est interrogatur, an uelit eum quem adoptaturus sit iustum sibi filium esse, et is qui adoptatur rogatur an id fieri patiatur.

Imperio magistratus adoptamus eos qui in potestate parentis sunt, siue primum gradum liberorum optineant, qualis est filius filia, siue inferiorem, qualis est nepos neptis, pronepos proneptis.

Illud utriusque adoptionis commune est quod et hi qui generare non possunt, quales sunt spadones, adoptare possunt.

<sup>1</sup> No restriction of place: Emperor's rescript required; Cod. viii. 47. 1 6.

<sup>2</sup> At Stud. Huschke.

<sup>3</sup> Women *sui iuris* were by Justinian's legislation adopted only by Emperor's rescript; Cod. viii. 47. 1 8; D. i. 7. 1 21, which passage is attributed to Gaius, but has doubtless been altered.

<sup>4</sup> See D. i. 7. 1 18; Cod. viii. 47. 1 2.

<sup>5</sup> Stud. inserts *personas*. Huschke inserts (before *aetatis*) *quemque*.

<sup>6</sup> Women were by Justinian's law sometimes allowed to adopt. Cod. vii. 47. 1 5.



*ros in potestate habent. Item si quis per populum siue apud praetorem uel apud praesidem provinciae adoptauerit, potest eundem alii in adoptionem dare. Set illa quaestio, an minor natu maiorem natu adoptare possit, utriusque adoptionis communis est. Illud proprium est eius adoptionis quae per populum fit, quod is qui liberos in potestate habet, si se adrogandum dederit, non solum ipse potestati adrogatoris subicitur, set etiam liberi eius in eiusdem fiunt potestate tamquam nepotes.*

Gai. *Inst.* II. 86—93.

Adquiritur autem nobis non solum per nosmet ipsos, sed etiam per eos quos in potestate *manu mancipio*ue habemus; item per eos seruos in quibus usumfructum habemus; item per homines liberos et seruos alienos quos bona fide possidemus: de quibus singulis diligenter dispiciamus. Igitur liberi nostri quos in potestate habemus, item quod serui *mancipio accipiunt uel ex traditione* nascuntur, siue quid stipulentur uel ex aliquolibet causa adquirunt, id nobis acquiritur: ipse enim qui in potestate nostra est, nihil suum habere potest; et ideo si heres institutus sit, nisi nostro iussu hereditatem adire non potest; et si iuventibus nobis adierit, hereditas nobis acquiritur, proinde atque si nos ipsi heredes instituti essemus; et conuenienter scilicet legatum per eos nobis acquiritur: dum tamen sciamus, si alterius in bonis sit seruus, alterius ex iure

*Hoc uero proprium est eius adoptionis, quae per principem fit, quod is qui liberos in potestate habet, si se adrogandum dederit, non solum ipse potestati adrogatoris subicitur, sed et liberi eius in eiusdem fiunt potestate tamquam nepotes.*

Dig. XLI. 1. 1 10.

Idem (Gaius) libro secundo institutionum.

Adquiruntur nobis non solum per nosmet ipsos, sed etiam per eos quos in potestate habemus, item per seruos in quibus usumfructum habemus; item per homines liberos et seruos alienos, quos bona fide possidemus; de quibus singulis diligentius dispiciamus. Igitur

quod serui nostri ex traditione nascuntur, siue quid stipulentur uel ex qualibet alia causa adquirunt, id nobis acquiritur: ipse enim, qui in potestate alterius est, nihil suum habere potest; ideoque si heres institutus sit, nisi nostro iussu hereditatem adire non potest; et si iuventibus nobis adierit, hereditas nobis acquiritur, perinde atque si nos ipsi heredes instituti essemus; et his conuenienter scilicet legatum nobis per eundem acquiritur.

*Quiritium, ex omnibus causis ei soli per eum adquiritur cuius in bonis est.* Non solum autem proprietas per eos quos in potestate habemus adquiritur nobis, sed etiam possessio: cuius enim rei possessionem adepti fuerint, id nos possidere uidemur; unde etiam per eos *usucapio procedit.* Per eas uero personas quas in manu mancipiæ habemus, *proprietas quidem adquiritur nobis ex omnibus causis sicut per eos qui in potestate nostra sunt; an autem possessio adquiratur, quaeri solet, quia ipsas non possidemus.* De his autem seruis in quibus tantum usumfructum habemus, ita placuit, ut quidquid ex re nostra uel ex operis suis adquirant id nobis adquiratur; *quod uero extra eas causas,* id ad dominum proprietatis pertineat: itaque si iste seruus heres institutus sit legatumue *quod ei datum fuerit,* non mihi sed domino proprietatis adquiritur. Idem placet de eo qui a nobis bona fide possidetur siue liber sit siue alienus seruus: quod enim placuit de usufructuario, idem probatur etiam de bonae fidei possessore. Itaque quod extra duas *istas causas* adquiritur, id uel ad ipsum pertinet, si liber est, uel ad dominum, si seruus *sit.* Sed bonae fidei possessor cum usuceperit seruum, quia eo modo dominus fit, ex omni causa per eum sibi adquirere potest. Usufructuarius uero usucapere non potest, primum quia non possidet sed habet ius utendi et fruendi, deinde quia scit alienum seruum esse.

Non solum autem proprietas per eos quos in potestate habemus adquiritur nobis sed etiam possessio: cuiuscumque enim rei possessionem adepti fuerint, id nos possidere uidemur; unde etiam per eorum longam possessionem dominum nobis adquiritur.

De his autem seruis, in quibus tantum usumfructum habemus, ita placuit, ut quidquid ex re nostra uel ex operis suis adquirant id nobis adquiratur; *si quid uero extra eas causas persecuti sint,* id ad dominum proprietatis pertinet: itaque si is seruus heres institutus sit, legatumue *quid aut ei donatum fuerit,* non mihi sed domino proprietatis adquiritur. Idem placet de eo qui nobis bona fide possidetur siue liber sit siue alienus seruus: quod enim placuit de usufructuario, idem probatur etiam de bonae fidei possessore. Itaque quod extra duas causas adquiritur, id uel ad ipsum pertinet, si liber est, uel ad dominum eius, si seruus est. Sed bonae fidei possessor cum usuceperit seruum, quia eo modo dominus fit, ex omnibus causis per eum sibi adquirere potest: usufructuarius uero usucapere *seruum* non potest, primum quia non possidet, sed habet ius utendi fruendi, deinde quoniam scit seruum alienum esse.

Mosaic. et Roman. legum collatio  
(ed. Bluhme) VII. 3.

Ulpianus libro XVIII. ad edictum  
sub titulo 'si quadrupes pauperiem  
dederit'.

Iniuria occisum esse merito adicitur, non enim sufficit occisum sed oportet iniuria id esse factum. *Proinde si quis servum latronem occiderit, lege Aquilia non tenetur quia<sup>2</sup> non occidit.* Sed et quemcumque alium ferro se petentem qui occiderit, non uidebitur iniuria occidisse. *Proinde si furem nocturnum, quem lex duodecim tabularum omnimodo permittit occidere, aut diurnum, quem aequae lex permittit, sed ita demum si se telo defendat, uideamus an lege Aquilia teneatur. Et Pomponius dubitat num haec lex non sit in usu.* Et si quis noctu furem occiderit, non dubitamus quin lege Aquilia<sup>3</sup> teneatur; sin autem cum posset adprehendere maluit occidere, magis est ut iniuria fecisse uideatur; ergo etiam lege Cornelia tenebitur. Iniuriam autem accipere hic nos oportet non, quemadmodum circa iniuriarum actionem, contumeliam quandam, sed, quod non iure factum est, hoc est contra ius, id est si culpa quis occiderit.

Dig. IX. 2. 1 3; 1 5. pr. § 1.

Ulpianus libro octauo decimo ad edictum.

*Si servus servaue iniuria occisus occisaue fuerit, lex Aquilia locum habet.*

Iniuria occisum esse merito adicitur, non enim sufficit occisum, sed oportet iniuria id esse factum<sup>1</sup>.

Sed etsi quemcumque alium ferro se petentem quis occiderit, non uidebitur iniuria occidisse.

Et si metu quis mortis furem occiderit, non dubitatur quin lege Aquilia non teneatur; sin autem cum posset adprehendere maluit occidere, magis est ut iniuria fecisse uideatur: ergo et Cornelia tenebitur. Iniuriam autem hic accipere nos oportet non, quemadmodum circa iniuriarum actionem, contumeliam quandam, sed, quod non iure factum est, hoc est contra ius, id est si culpa quis occiderit.

<sup>1</sup> The treatment of the robber and the night thief slain are in the Digest given somewhat more fully in an interpolated extract from Gaius *ad Edict. prou.*

<sup>2</sup> Huschke inserts *iniuria*.

<sup>3</sup> Huschke omits *non* two lines higher and adds it here after *Aquilia*.



Mosaic. et Roman. legum collatio  
(ed. Bluhme) XII. 7.

Dig. IX. 2. 1 27. § 7.

Ulpianus libro XVIII. ad edictum,  
sub titulo 'si fatebitur iniuria oc-  
cisiu esse, in simplum ut condi-  
ceret'.

(Ulpianus libro octauo decimo ad  
edictum.)

Item si *insulam meam adusseris*  
*uel* incenderis, Aquiliae actionem  
habebo. *Idemque est et si arbustum*  
*meum uel uillam meam. Quodsi*  
*dolo quis insulam exusserit, etiam*  
*capitis poena plectitur quasi incen-*  
*diarius. Item si quis insulam uo-*  
*luerit exurere, et ignis etiam*  
*ad uicini insulam peruenerit, Aquilia*  
*tenebitur lege uicino: non minus*  
*etiam inquilinis ob res*  
*eorum exustas, et ita Labeo libro*  
*responsorum XV refert. Sed si sti-*  
*pulam in agro tuo incenderis, ignis-*  
*que euagatus ad praedrum uicini*  
*peruenerit, et illud exusserit, Aquilia*  
*lex locum habeat an in factum actio*  
*sit, fuit quaestionis. Et plerisque*  
*Aquilia lex locum habere non ui-*  
*detur, et ita Celsus libro XXXVII. di-*  
*gestorum scribit. Ait enim, si sti-*  
*pulam incendit ignis effugit, Aquilia*  
*lege eum non teneri, sed in factum*  
*agendum, quia non principaliter hic*  
*exussit, sed dum aliud egit, sic ignis*  
*processit. Cuius sententia scilicet*  
*rescripto Diui Seueri comprobata est*  
*in haec uerba: Praeses prouinciae si*<sup>1</sup>  
*propter ignem, (qui)*<sup>2</sup>  
*pabuli gratia factus culpa seruorum Ueturiae As-*  
*tiliae euagatus agrum tuum, ut pro-*  
*ponis, depopulatus est, ad exemplum*  
*legis Aquiliae noxali iudicio acturus*  
*(es)*<sup>2</sup>, *si litis aestimatio permittitur,*  
*iudicium accommodare potest. Uide-*  
*licet non est uisum Aquiliam suffi-*

Item si  
arbustum  
meum uel uillam meam incenderis,  
Aquiliae actionem habebo.

Si quis insulam uo-  
luerit *meam* exurere, et ignis etiam  
ad uicini insulam peruenerit, Aquilia  
tenebitur *etiam* uicino; non minus  
etiam inquilinis *tenebitur* ob res  
eorum exustas.

<sup>1</sup> *Praeses prou.* si is Bluhme's conj. for the ms. reading *profiteri*.

<sup>2</sup> Inserted by the Editors.

*cere.* Si forte seruus coloni ad fornacem obdormisset et uilla fuerit exusta, Neratius scribit ex locato conuentum praestare debere, si neglegens in eligendis ministeriis fuit. Ceterum si alius ignem subiecerit fornaci, alius neglegenter custodierit?

nam qui non custodit, nihil fecit, qui recte ignem subiecit, non peccauit: *quemadmodum si hominem medicus<sup>1</sup> recte secuerit, sed neglegenter uel ipse uel alius curauerit, Aquilia cessat.* Quid ergo est? Et hic puto ad exemplum Aquiliae dandam actionem tam in eum qui ad fornacem obdormiuit uel

neglegenter custodiit, *quam in medicum qui neglegenter curauit, siue homo perit siue debilitatus est.* Nec quisquam dixerit in eo qui obdormiuit rem eum humanam et naturalem passum, cum deberet uel ignem extinguere uel ita munire ut non euagaret. Item libro VI. ex *Uuiano* relatum est: si furnum secundum parietem communem haberes, an damni iniuria tenearis? Et ait agi non posse *Aquilia lege*, quia nec cum eo qui focum haberet: et ideo aequum putat in factum actionem dandam. Sed non proponit exustum parietem. Sane enim quaeri potest (si)<sup>2</sup> nondum mihi damnum dederis, et ita ignem habeas ut metuam ne mihi detur, aequum sit me interim actionem in factum impetrare. Fortassis enim de hoc senserit *Proculus*: nisi quis dixerit damni non facti sufficere cautionem. Sed et si qui serui in-

Si *fornicarius* seruus coloni ad fornacem obdormiisset et uilla fuerit exusta, Neratius scribit ex locato conuentum praestare debere, si neglegens in eligendis ministeriis fuit. Ceterum si alius ignem subiecerit fornaci, alius neglegenter custodierit, *an tenebitur qui subiecerit?* nam qui custodit, nihil fecit, qui recte ignem subiecit, non peccauit.

Quid ergo est?

puto utilem competere

actionem tam in eum qui ad fornacem obdormiuit quam in eum qui neglegenter custodit.

Nec quisquam dixerit in eo qui obdormiuit rem eum humanam et naturalem passum, cum deberet uel ignem extinguere uel ita munire ne euagetur.

Si furnum secundum parietem communem haberes, an damni iniuria tenearis? Et ait *Proculus* agi non posse quia nec cum eo qui focum haberet: et ideo aequius puto in factum actionem dandam, scilicet si paries exustus sit. Sin au-

tem nondum mihi damnum dederis, sed ita ignem habeas, ut metuam, ne mihi damnum des,

damni infecti puto sufficere cautionem.

<sup>1</sup> The case of the doctor's neglect is omitted in the Digest, because it has already been dealt with in an extract from Gaius which forms l 8 of this title.

<sup>2</sup> Inserted by the Editors.

*quilini*<sup>1</sup> *insulam exusserint, libro x. Urseius refert Sabinum respondisse, lege Aquilia seruorum nomine dominum noxali iudicio conueniendum; ex locato autem dominum teneri negat. Proculus autem respondit, cum coloni serui uillam exusserint, colonum uel ex locato uel lege Aquilia teneri ita, ut colonus seruorum posset noxae dedere, et, si uno iudicio res esset iudicata, altero amplius non agendum.*

*Celsus libro xxvii. digestorum scribit: si cum apes meae ad tuas aduolassent, tu eas exusseris, quosdam negare competere legis Aquiliae actionem, inter quos et Proculum, quasi apes domini non fuerint. Sed id falsum esse Celsus ait, cum apes reuenire soleant et fructui mihi sint. Sed Proculus eo mouetur quod nec mansuetae nec ita clausae fuerint. Ipse autem Celsus ait nihil inter has et columbas interesse, quae si manu refugiunt, domi<sup>3</sup> tamen fugiunt.*

Ulpianus *Reg. xx. 6.*

Pater et filius qui in potestate eius est, item duo fratres qui in eiusdem patris potestate sunt, testes utrique, *uel alter testis, alter libri-*

Proculus ait cum coloni serui uillam exusserint, colonum uel ex locato uel lege Aquilia teneri ita, ut colonus possit seruorum noxae dedere, et, si uno iudicio res esset iudicata, altero amplius non agendum. *Sed haec ita si culpa colonus careret: ceterum si noxios seruos habuit, damni eum iniuria teneri, cur tales habuit. Idem<sup>2</sup> seruandum et circa inquilinorum insulae personas scribit: quae sententia habet rationem. Si cum apes meae ad tuas aduolassent, tu eas exusseris, legis Aquiliae actionem competere Celsus ait.*

Dig. xxii. 5. 1 17.

Ulpianus libro singulari regularum.

Pater et filius qui in potestate eius est, item duo fratres qui in eiusdem patris potestate sunt, testes utrique *in eodem testamento uel eodem*

<sup>1</sup> The Digest has dealt with this case briefly after the case of the farmer's slaves.

<sup>2</sup> This is an abridgment of Ulpian's treatment of the lodger's slaves before the case of the farmer's slaves.

<sup>3</sup> *domitae* Huschke.



<i>pens fieri possunt alio familiam</i>	<i>negotio fieri possunt,</i>
<i>emente, quoniam nihil nocet ex una</i>	<i>quoniam nihil nocet ex una</i>
<i>domo plures testes alieno negotio</i>	<i>domo plures testes alieno negotio</i>
<i>adhiberi.</i>	<i>adhiberi.</i>

The chapter of Ulpian is dealing with wills and therefore it was unnecessary for Ulpian to mention here the subject-matter of the evidence spoken of. But the title of the Digest is 'on witnesses' in general, and hence we have the addition of *in eodem testamento uel eodem negotio*. The Institutes (II. 10. § 8) have the same passage, but there as the chapter is on wills, *in unum testamentum* only is added. Ulpian's reference to the *libripens* and *familiae emptor* is of course omitted by Justinian in both places, as obsolete in connexion with mancipation.

Paul. *Sent.* III. 6. § 15.

Qui se filio testatoris impuberi tutorem adscripserit, *ut suspectus a tutela remouendus est, ad quam ultro uidetur adfectasse.*

Dig. XLVIII. 10. l 18. § 1.

Paulus libro tertio sententiarum.

Qui se filio testatoris impuberi tutorem adscripsit, *etsi suspectus esse praesumitur, quod ultro tutelam uidebitur affectasse, tamen si idoneus esse adprobetur, non ex testamento sed ex decreto tutor dandus est. Nec excusatio eius admittetur, quia consensisse uidetur uoluntati testatoris.*

The Digest largely modifies the doctrine of Paul.

Paul. *Sent.* v. 11. § 6.

*Ei qui aliquem a latrunculis uel hostibus eripuit, in infinitum donare non prohibetur (si tamen donatio et non merces eximii laboris appellanda est), quia contemplatione salutis certo modo aestimari non placuit.*

Dig. xxxix. 5. l 34. § 1.

Paulus libro quinto sententiarum.

*Si quis aliquem a latrunculis uel hostibus eripuit et aliquid pro eo ab ipso accipiat, haec donatio irrevocabilis est: non merces eximii laboris appellanda est, quod contemplatione salutis certo modo aestimari non placuit.*

See Savigny, *Syst.* iv. p. 97. *In infinitum* had reference to the restrictions of the *lex Cincia*, and was therefore changed in the Digest to a more general term. *Certo modo* had reference to the same, but by a change in the Digest we get the somewhat inept remark that the impossibility of accurately

measuring the merit of saving life prevents *merces* being an appropriate term, instead of the appropriate remark of Paulus that a gift in such a case is not so much a gift as a well-earned payment. *Si tamen—appellanda est* is parenthetical in Paulus. The corrector of the Florentine Digest writes *nam* for *non*, which would greatly improve the sense.

Vat. Fr. 12.  
(Ex Papinian. *Responsor.* libro III.)

Ante pretium solutum dominii quaestione mota pretium emptor restituere non cogetur, *tametsi* maxime fideiussores

euictionis offerantur, cum ignorans possidere coeperit. Nam usucapio frustra complebitur anticipata lite, nec oportet euictionis securitatem praestari, cum in ipso contractus limine domini periculum immineat.

By the change of *tametsi* into *nisi*, the meaning is reversed. The alteration was evidently caused by Cod. VIII. 44. (45.) l 24. (Cf. Bruns *Quid conferant Vat. Fr.*, p. 25.)

Vat. Fr. 75—83.

(I omit the first part of this fragment as too imperfectly preserved for proper comparison. It seems to have corresponded pretty closely to Dig. VII. 2. l 1. pr. and § 1, but contained a reference to the *do lego* form of bequest.)

75. Idem ait et si communi seruo et separatim Titio ususfructus legatus sit, *amissam partem*

ususfructus non ad Titium, sed ad solum socium pertinere debere quasi solum coniunctum. Quam sententiam neque Marcellus neque Mauricianus probant: Papinianus quoque libro XVII. quaestionum ab ea recedit. Quae sententia Nerati fuit, est libro I. responsorum relatum. Sed puto esse ueram Iuliani sententiam; nam quamdiu uel unus utitur, potest dici usumfructum in suo esse statu.

Dig. XVIII. 6. l 19. (18.) § 1.  
Papinianus libro tertio Responsorum.

Ante pretium solutum dominii quaestione mota pretium emptor solvere non cogetur, *nisi*

fideiussores idonei a uenditore eius euictionis offerantur.

Dig. VII. 2. l 1. § 2.  
(From Ulpian *ad Sabin.* XVII. 'Idem' means Julian.)

§ 2. Idem ait et si communi seruo et separatim Titio ususfructus legatus sit, *amissum ab altero ex sociis usumfructum* non ad Titium sed ad solum socium pertinere debere quasi solum coniunctum: quae sententia

uera est.  
nam quamdiu uel unus utitur, potest dici usumfructum in suo statu esse.

*Pomponius ait libro VII. ex Plautio, relata Iuliani sententia, quosdam esse in diversam opinionem; nec enim magis socio debere adcrecere, quam deberet ei, qui fundi habens usumfructum partem ususfructus proprietario cessit uel non utendo amisit. Ego autem Iuliani sententiam non ratione adcrescendi probandam puto, sed eo quod quamdiu seruus est, cuius persona in legato spectatur, non debet perire portio. Urgetur tamen Iuliani sententia argumentis Pomponi; quamquam Sabinus responderit ut et Iulianus<sup>1</sup> libro XVIII. digestorum refert, eum qui partem ususfructus in iure cessit et amittere partem et ipso momento recipere. Quam sententiam ipse ut stolidam reprehendit; etenim esse incogitabile eandem esse causam cuique et amittendi et recipiendi.*

76. *Iulianus scribit, si seruo communi et Titio ususfructus legetur et unus ex dominis amiserit usumfructum, non adcrecere Titio, sed soli socio quemadmodum fieret si duobus coniunctim et alteri separatim esset relictus. Sed qui diversam sententiam probant, quid dicerent? utrum extraneo soli an etiam socio adcrecere? et qui Iulianum consuluit, ita consuluit an ad utrum pertineat, quasi possit et ipsi socio adcrecere. Atquin quod quis amittit secundum Pomponi sententiam ipsi non accedit.*

77. Interdum tamen etsi non sint coniuncti, tamen ususfructus legatus alteri adcrecit, ut puta si mihi fundi ususfructus separatim totius et tibi similiter fuerit usus-

*Idem est si duobus coniunctim et alteri separatim ususfructus esset relictus.*

§ 3. Interdum tamen etsi non sint coniuncti, tamen ususfructus legatus alteri adcrecit: ut puta si mihi fundi ususfructus separatim totius et tibi similiter fuerit

<sup>1</sup> The Editors change *Iulianus* into *Celsus* and XVIII. into XVIII.



*fructus* relictus; nam ut Celsus libro XVIII. digestorum et Iulianus libro XXXV.

scribunt concursu partes habemus. Quod et in proprietate contingeret; nam altero repudiante alter totum fundum haberet. Sed in usufructu hoc plus est (*contra quam Atilicinum respondisse Anfidius Chius refert*) quod et constitutus nihilo minus amissus ius adcrendi admittit<sup>1</sup>. Omnes enim auctores apud Plautium de hoc consenserunt ut et Celsus et Iulianus eleganter aiunt, usufructus cotidie constituitur et legatur, non ut proprietas eo solo tempore quo uindicatur. Cum primum itaque non inueniet alterum qui sibi concurrat, solus utetur totum. *Uindictus tamen, dum consulit Iulianum, in ea opinione est ut putet non alias ius adcrendi esse quam in coniunctis, qui responso ait: nihil refert, coniunctim an separatim relinquatur.*

78. Iulianus libro XXXV.

scribit, si duobus heredibus institutis deducto usufructu proprietates legetur, ius adcrendi heredes non habere, nam uideri usumfructum constitutum<sup>2</sup>, non per concursum diuisum.

79. Neratius putat cessare ius adcrendi libro I. responsorum. Cuius sententiae congruit ratio Celsi dicentis totiens ius adcrendi esse, quotiens in duobus

relictus: nam ut et Celsus libro octauo decimo digestorum et Iulianus libro tricesimo quinto scribit, concursu partes habemus. Quod et in proprietate contingeret; nam altero repudiante alter totum fundum haberet. Sed in usufructu hoc plus est,

quia et constitutus et postea amissus nihilo minus ius adcrendi admittit. Omnes enim auctores apud Plautium de hoc consenserunt, et ut Celsus et Iulianus eleganter aiunt, usufructus cottidie constituitur et legatur, non ut proprietas eo solo tempore quo uindicatur. Cum primum itaque non inueniet alter eum qui sibi concurrat, solus utetur in totum.

nec

refert coniunctim an separatim relinquatur.

§ 4. *Idem* Iulianus libro trigesimo quinto digestorum scripsit, si duobus heredibus institutis deducto usufructu proprietates legetur, ius adcrendi heredes non habere; nam uideri usumfructum constitutum, non per concursum diuisum.

2. *Africanus libro quinto quaestionum: ideoque amissa pars usufructus ad legatarium eundemque proprietarium redibit.*

3. *Ulpianus libro septimo decimo ad Sabinum. Idem* Neratius putat cessare ius adcrendi libro primo responsorum: cui sententiae congruit ratio Celsi dicentis totiens ius adcrendi esse, quotiens in duobus

<sup>1</sup> A mere copyist's error for *admittit*.

<sup>2</sup> Mommsen suggests the insertion of *partium*.

qui solidum habuerunt concursu diuisus est. 80. Unde Celsus libro XVIII. :

si duo fundi domini deducto usufructu proprietatem *mancipauerint*, uter eorum amiserit, usumfructum ad proprietatem redire, sed non ad totam, sed cuiusque usumfructum ei parti accedere quam ipse *mancipauit*; ad eam enim partem redire debet a qua initio diuisus est. *Plane inquit si partem ususfructus habeat et ego totam proprietatem cum partis usufructu, non posse me meam partem tibi mancipare quae est sine usufructu, quoniam nullam partem habeo in qua non est tibi ususfructus.* 81. (*Papinianus*)<sup>1</sup> quoque libro XVIII. quaestio-num sententiam *Nerati* probat quae non est sine ratione.

82. *Poterit quaeri, si duobus seruis heredibus institutis deducto usufructu proprietatis sit legata, an altero defuncto ususfructus proprietatis adcreseat; nam illud constat, ut et Iulianus libro XXXV. scribit et Pomponius libro VII. ex Plautio non reprobatur, si duobus seruis meis ususfructus legetur et alter decesserit, cum per utrumque quaevissem usumfructum, ius adcrescendi me habere, cum, si alterius nomine repudiassem alterius quaevissem, haberem quidem usumfructum totum iure adcrescendi sed ex solius persona amitterem. In proposito autem si quidem pure fundus non<sup>2</sup> ex persona serui; et ita Iulianus quoque libro XXXV. digestorum scribit, quamvis Scaeuola apud Marcellum dubitans notet. Ad<sup>3</sup> si*

qui *in solidum* habuerunt concursu diuisus est. § 1. Unde Celsus libro octauo decimo *scribit*, si duo fundi domini deducto usufructu proprietatem *tradiderint*, uter eorum amiserit, usumfructum ad proprietatem redire, sed non ad totam, sed cuiusque usumfructum ei parti accedere, quam ipse *tradiderit*; ad eam enim partem redire debet a qua initio diuisus est.

<sup>1</sup> Inserted by the Editors.

<sup>2</sup> Hollweg and Mommsen insert, as required by the sense '*sub condicione legatus sit, constituitur ususfructus*'. See also Huschke.

<sup>3</sup> Mommsen dubitare se notet. At...

*sub condicione sit legatus, potius ex persona domini constitui usumfructum Marcellus libro XIII. digestorum scribit. Ubi Scaeuola notat, quid si pure? Sed dubitare non debuit, cum et Iulianus scribat ex persona serui constitui. Secundum quae ius ad- crescendi locum habere<sup>1</sup> in duobus seruis, si quis contrariam sententiam probaret. Sed nunc secundum Iuliani sententiam et Nerati cessat quaestio.*

83. Non solum autem, si duobus *do lego* ususfructus legetur, erit ius ad- crescendi, uerum si alteri usus- fructus alteri *proprietas*;

nam, amittente usumfructum altero cui erat legatus, magis iure ad- crescendi ad alterum pertinet quam redit ad proprietatem. Nec nouum.

Nam et si duobus ususfructus legetur et apud alterum sit con- solidatus, ius ad- crescendi non perit nec ei apud quem consolidatus est neque ab eo, et ipse, quibus modis amitteret ante consolidationem, *isdem* et nunc *ipso quidem iure* non amittet, *sed praetor secutus exemplum iuris civilis utilem actionem dabit fructuario* et ita Neratio et Aristoni uidetur et Pomponius probat.

§ 2. Non solum autem, si duobus ususfructus legetur, est ius ad- crescendi, uerum *et* si alteri usus- fructus, alteri *fundus legatus est*: nam, amittente usumfructum altero cui erat legatus, magis iure ad- crescendi ad alterum pertinet quam redit ad proprietatem. Nec nouum.

Nam et si duobus ususfructus legetur et apud alterum sit con- solidatus, ius ad- crescendi non perit neque ei apud quem consolidatus est, neque ab eo, et ipse, quibus modis amitteret ante consolidationem, *isdem* et nunc amittet

et ita et Neratio et Aristoni uidetur et Pomponius probat.

Vat. Fr. §§ 86—88.

[Some pages (partly lost) after the above extract.]

86. *Nouissime quod ait Sabinus, si uxori cum liberis usus- fructus legetur, amissis liberis eam habere, quale sit uiden- dum. Et si quidem do lego legetur, tametsi quis filios legatarios acceperit, sine dubio locum habebit propter ius*

Dig. vii. 2. 1 8.

Ulpianus libro septimo decimo ad Sabinum.

*Si mulieri cum liberis suis usus- fructus legetur, amissis liberis ea usumfructum habet:*

<sup>1</sup> *haberet* Edd.



*adcrescendi; sed si legatarii non fuerint, multo magis, quoniam partem ei non fecerunt, tametsi cum ea uterentur. Matre autem mortua, si quidem legatarii fuerint, soli habebunt iure adcrescendi; si heredes non iure adcrescendi, sed iure dominii, si fundus eorum est, ipsis adcrescit, sin minus, domino proprietatis; sed si nec heredes fuerint nec legatarii, nihil habebunt. Quod si per damnationem fuerit ususfructus legatus matri, si quidem legatarii sunt filii, partes sunt<sup>1</sup>; si non sunt, sola mater legataria est, nec mortalitas liberorum partem ei facit. 87. Sabinus certe uerbis istis non ostendit utrum legatarii fuerint necne. Sed Iulianus XXXV. digestorum relata Sabini scriptura ait intellegendum eum qui solos liberos heredes scribit,*

*non ut legatariorum fecisse mentionem, sed ut ostenderet magis matrem ita se uelle frui ut liberos secum habeat. Alioquin, inquit, in damnatione ratio non permittebat ius adcrescendi. Proposuit autem Iulianus uel do lego legatum ususfructum uel per damnationem, et sic sensit quasi<sup>2</sup> legatarii sint et heredes soli, in do lego legato non esse ius adcrescendi; adque si alteri ab altero legetur, quoniam a semet ipsis inutiliter legatum est, sibi non concurrunt, matri uero non in totum concurrunt sed alter pro alterius portione, et in eo dumtaxat ius adcrescendi erit; mater tamen aduersus utrumque ius adcrescendi habet.*

88. *Iulianus subicit Sextum quoque Pomponium praeferre<sup>3</sup> si per*

*sed et matre mortua liberi eius nihilo minus ususfructum habent iure adcrescendi.*

*Nam et Iulianus libro trigensimo digestorum*

*ait idem intellegendum in eo qui solos liberos heredes scripserit, licet non ut legatarios eos nominauerit, sed ut ostenderet magis uelle se matrem ita frui ut liberos secum habeat fruantes*

<sup>1</sup> For sunt Hollweg suggests *habebunt* or *fiunt*: Mommsen gives *sumunt*.

<sup>2</sup> Mommsen and Huschke put *quamuis* for *quasi*.

<sup>3</sup> *referre*, Mommsen.

*damnationem ususfructus et liberis uxori*<sup>1</sup> *legetur, singulare hoc esse adque ideo fili personam matri*<sup>2</sup> *accederet, nec esse legatarios sed matre mortua liberos quasi heredes usumfructum habituros. Ego, inquit Pomponius, quaero quid si mixti fuerint liberi extranei heredes? ait et filios pro legatariis habendos, et mortui partem interituram, Aristonem autem adnotare haec uera esse: et sunt uera.*

*sed et Pomponius quaerit; quid si mixti fuerint liberi et extranei heredes? et ait filios legatarios esse intellegendos, et*

*per contrarium si uoluit eos liberos simul cum matre frui, debere dici matrem legatariam esse intellegendam et per omnia similem esse et in hoc casu iuris euentum.*

Vat. Fr. 75, 76 = Dig. VII. 2. 1. 1. § 2. Ulpian, or rather Julian, whom he quotes, discusses two questions. 1. Usufruct left to common slave and in a separate sentence left to Titius: one of the partners in the slave loses the usufruct: to whom does it accrue? 2. Usufruct left to common slave and Titius in same clause: one partner loses his share: to whom does it accrue? Julian in both cases says the usufruct or part of the usufruct lost accrues to the partner in the slave only. Ulpian, as regards the first case, holds that there is not strictly speaking any accrual, but that the partner retains the whole through the medium of the common slave. The second case he does not decide expressly, but probably would treat it as the first case. In the Digest we have the first case only given, with a slight change in the expression (*usumfructum* for *partem ususfructus*) borrowed from the other case, Ulpian's observations on which are then struck out entirely, except an illustration (*quemadmodum fieret si*), which is made into a substantive statement (*Idem est si duobus*). See Arndts in Glück's *Pand.* XLVIII. p. 145 sqq.

Vat. Fr. 78 = 1. 1. § 4. The Digest adds a sentence from Africanus (1 2) in order to make it clear what becomes of the usufruct, if lost in the case supposed.

Vat. Fr. 80—82. This consists (a) of the case of two owners selling an estate and reserving the usufruct. The usufruct, if lost by one, follows

<sup>1</sup> Mommsen reads *cum liberis uxori*.

<sup>2</sup> Mommsen inserts here *accedere, ne sine liberis ad usumfructum mater*.

the propriety, but only that part of the propriety to which it originally belonged. The two sellers were evidently not joint owners of the whole estate, but owners of separate portions (i.e. *fundum regionibus divisum*). The Digest takes this, but changes *mancipare* to *tradere*, on which cf. Arndts in Glück XLVIII. p. 193.

(b) Then follows a case which is not very easy to understand. I take it that the case supposed is that of A owner of the propriety of the whole of an estate and of the usufruct only of part of it, desiring to arrange with B who has part of the usufruct of the whole, so that each may have a separate estate without the other having any usufruct in it. A tries to effect this by conveying to B the bare ownership in that part of the estate in which A has not the usufruct, and thinks by so doing B's partial usufruct will attach to this portion and drop away from the portion of the estate which A still retains. Celsus says no: B has a partial usufruct in the whole, and consequently after the mancipation will have the propriety in the portion of the estate so conveyed to him, but will still be partner with A in the usufruct of the estate retained by A. But this is not expressed in the passage, and perhaps on this account Tribonian cut it out. Arndts deals but slightly and unsatisfactorily with this case. Glück XLVIII. p. 194.

(c) Then fragment 82 contains a discussion of the question named in fr. 78 and beginning of 79, but takes the special suppositions of *slaves* being legatees of a usufruct, and the more difficult case of slaves being heirs, an estate bequeathed away and the usufruct reserved. The section concludes with the view that this case is ruled by the general principle laid down by Julianus and Neratius. Hence the Digest omits all this and ignores the subordinate question, whether there is a distinction between a pure and conditional legacy, so that in a pure legacy the duration of the usufruct depends on the slave's life, in a conditional legacy on the life of the master who acquires through the slave; the reason of which distinction I do not see, unless the condition meant be one pointing to the interest of the master. See notes on l 6. § 2. p. 52; l 21. pp. 151, 152 and p. 178. There is however an omission in the middle of the passage, which is variously supplied by the editors. If we had the case as Ulpian wrote it, we should perhaps be saved much difficulty.

Vat. Fr. 83= l 3. § 2. The Digest of course omits *do lego* and thus makes the rule applicable to legacies in general. Then it alters *proprietas* to *fundus*, which I take to be an alteration merely of expression, for clearness sake, not of context. I suppose Ulpian in writing *proprietas* as given by the Vat. Fr., to have meant a legacy of *proprietas*, i.e. *plena proprietas*, the bequest running *proprietatem illius fundi do lego*. If he had said *proprietatem deducto usufructu do lego*, the legatee would have only had the bare ownership and there could have been no question of accrual, but only of reversion. See D. xxxiii. 2. l 19.



The latter part of the Vat. Fr. is based on the principle that where the usufruct is once merged, even though partially, it no longer exists as regards that part, and therefore cannot be lost (see note on p. 203). This principle of strict law was however modified by the Praetor, who was unwilling that one holder of a usufruct should, by acquiring the propriety, oust the other holder of his chance of an accrual. The Digest going on the principle of recognising the Praetor's action as law not merely practically but theoretically, lays down the rule absolutely.

Vat. Fr. 86—88=D. VII. 2. 1 8. In this case the Digest is more of an abridgment than a corrected edition. The passage in Ulpian is largely composed of the contrast between the two principal forms of legacy, and the different cases which Sabinus may have meant. He may have intended to put the case of the children being heirs and the mother a legatee of the usufruct along with her children; or of the mother only being a legatee, but the testator wishing her to enjoy the usufruct along with the children. And the propriety may be left with the heirs or may be bequeathed away. If the children are not legatees, along with their mother, there can be no accrual; if they are heirs, they would take on the mother's death, but not by accrual but in virtue of their propriety. And this is supposing the legacy to have been made by *do lego*. If it was *per damnationem*, then in no case would there be accrual (cf. Gai. II. 205). Supposing however that the children were heirs and legatees with no outsider as heir, they cannot even by a *do lego* legacy have any accrual amongst themselves. For each must take his legacy not from himself as heir, but from one of his brothers, and thus their shares are as if were already marked off and do not admit of concurrence as regards one another, but only as regards their mother. With her there is a concurrence, but only as regards each several share. It seems to me that this supposes only two children: if there were three, the usufruct might be bequeathed from heir A to B and C and the mother; and from heir B to A and C and mother, and so on; in which case there might be accrual between the children among themselves as well as with their mother.

The passage is a striking example of the freedom with which the compilers of the Digest dealt with the old lawyers, and the little resemblance there may have been in the original text to the law given in the Digest with their name. Even when the words are more or less the same, the immediate context may have been, as here it is, very different, one of several alternatives being put as alone true, and the real points of the discussion being ignored or distorted. See Arndts in Glück XLVIII. p. 194.

I add merely by way of sample two specimens of the free way in which the compilers of the Code handled the matter submitted to them.

Vat. Fr. 283.

Idem (sc. Diocletianus) Aurelio Carrenoni.

Si *stipendiariorum* proprietatem dono dedisti ita, ut post mortem eius qui accepit ad te rediret, donatio *inrita est*, cum ad te<sup>1</sup> *proprietas transferri nequiverit*. Si uero *usumfructum in eam, contra quam supplicasset, contulisti, usumfructum a proprietate alienare non potuisti*.

Proposita v. id. Mart. Maximo et Aquilino cons. [i.e. A.D. 286].

Cod. Theodos. II. 26. 1 1.

(Ex Gromat. Script. p. 267, ed. Lachmann.)

Imp. Constantinus Aug. ad Tertulianum *Uirum perfectissimum comitem dioceseos Asianae*.

Si quis super *inuasis* sui iuris locis prior detulerit quaerimoniam quae *finali* cohaeret de proprietate controuersiae, prius super possessione quaestio finiatur, et tunc agri mensor ire praecipiat ad loca, ut patefacta ueritate huius modi litigium terminetur. Quod si altera pars, *locorum adepti dominium, subterfugiendo moras adtulerit ne possit controuersia definiri, a locorum ordine selectus* agri mensor dirigatur ad loca; ut si *fidelis inspectio tenentis locum esse probauerit, petitor uictus abscedat; at si controuersia eius claruerit qui primo iudiciis detulerit causam, ut*

Cod. Just. VIII. 54 (55) 1 2.

Imp. Diocletianus et Maximianus AA Zenoni.

Si *praediorum* proprietatem dono dedisti ita, ut post mortem eius qui accepit ad te rediret, donatio *ualet*, cum etiam ad tempus certum uel incertum ea fieri potest, lege scilicet quae ei imposita est conseruanda.

PP v. id. Mart. Maximo II. et Aquilino cons.

Cod. Just. III. 39. 1 3.

Imp. Constantinus A. ad Tertulianum.

Si quis super iuris sui locis prior *de finibus* detulerit querimoniam, quae proprietatis controuersiae cohaeret, prius super possessione quaestio finiatur, et tunc agri mensor ire praecipiat ad loca, ut patefacta ueritate huius modi litigium terminetur. Quod si altera pars, ne huius modi quaestio terminetur, se subtraxerit, nihilominus

agri mensor in ipsis locis iussione rectoris prouinciae una cum obseruante parte hoc ipsum faciens perueniet.

D. VIII. k. Mart. Bessi Gallicano et Symmacho cons.

Cod. Just. VIII. 4 1 5.

Imp. Constantinus A. ad Tertulianum.

<sup>1</sup> The ms. has *te*; Mommsen and Huschke read *tempus*.

inuasor *ille* poena teneatur  
*edicti*, si tamen ui *ea* loca eundem  
 inuasisse constiterit : nam si per er-  
 rorem aut incuriam domini loca *data*  
 ab aliis possessa sunt, *ipsis solis*  
*cedere debent*.

Dat. VIII. kl. Mar. Gallicano et  
 Symmacho consulibus (i.e. A.D. 330).

Inuasor *locorum* poena teneatur  
*legitima*, si tamen ui loca eundem  
 inuasisse constiterit. Nam si per er-  
 rorem aut incuriam domini loca  
 ab aliis possessa sunt, *sine poena*  
*possessio restitui debet*.

D. VI. k. Mart. Gallicano et  
 Symmacho cons.

## CHAPTER VI.

### INTRODUCTION TO ACCOUNT OF JURISTS.

JUSTINIAN in giving directions for the compilation of the Digest instructed Tribonian and his colleagues to collect the matter out of the writings of the ancient lawyers who had received imperial authority to compose and interpret laws. He added that there were other writers whose works had not been accepted by any authorities or used in practice, but that he did not consider these worthy of recognition in his Digest. The words are *Iubemus igitur uobis antiquorum prudentium, quibus auctoritatem conscribendarum interpretandarumque legum sacratissimi principes præbuerunt, libros ad ius Romanum pertinentes et legere et eliminare, ut ex his omnis materia colligatur, nulla, secundum quod possibile est, neque similitudine neque discordia derelicta, sed ex his hoc colligi quod unum pro omnibus sufficiat. Quia autem et alii libros ad ius pertinentes scripserunt, quorum scripturae a nullis auctoribus receptae nec usitatae sunt, neque nos eorum uolumina nostram inquietare dignamur sanctionem* (Const. *Deo auctore*, § 4). The question arises upon this, who were the lawyers who had received the 'imperial authority to draw up and interpret laws'. Reference may be made to the practice introduced by Augustus of a license to certain lawyers to give authoritative answers (see notes, p. 102). Who (besides Sabinus to whom Tiberius gave a license, D. i. 2. l 2. § 48) actually received such license we do not know, though several of the great lawyers issued books of *responsa* or *epistulae* or *quaestiones*, which probably contained cases on which they gave such authoritative opinions. Three



constitutions however (Cod. Theod. i. 4) appear to have a special bearing on the application of Justinian's words. One is by Constantine (A.D. 321) *Perpetuas prudentium contentiones eruere cupientes Ulpiani ac Paulli in Papinianum notas, qui dum ingenii laudem sectantur non tam corrigere eum quam deprauare maluerunt, aboleri praecipimus* (cf. ib. ix. 43. 1 1). What fit of spleen dictated this law we know not. Paul's writing met with more favour subsequently from the same emperor (A.D. 327). *Uniuersa, quae scriptura Paulli continentur, recepta auctoritate firmanda sunt, et omni ueneratione celebranda. Ideoque Sententiarum libros, plenissima luce et perfectissima elocutione et iustissima iuris ratione succinctos, in iudiciis prolatos ualere minime dubitatur*. So far however we have only got the names of Papinian and Paul among writers and Sabinus among the early authoritative advisers. But in the year 426 A.D. a constitution bearing the names of Theodosius II. and Valentinian III. (often called Valentinian's *Citirgesetz*—with what justice may be inferred from the fact that Valentinian was then seven years old) was passed which gave a comprehensive decision on the question and was probably what Justinian had in mind. The constitution as we have it (Cod. Th. i. 4. 1 3) speaks thus: *Papiniani, Paulli, Gaii, Ulpiani, atque Modestini scripta uniuersa firmamus, ita ut Gaium, quae Paulum Ulpianum et cunctos, comitetur auctoritas, lectionesque ('passages') ex omni eius opere recitentur. Eorum quoque scientiam, quorum tractatus atque sententias praedicti omnes suis operibus miscuerunt, ratam esse censemus, ut Scaeuolae, Sabini, Iuliani, atque Marcelli, omniumque quos illi celebrarunt, si tamen eorum libri propter antiquitatis incertum codicum collatione firmentur. Ubi autem diuersae sententiae proferuntur, potior numerus uincat auctorum, uel si numerus aequalis sit, eius partis praecedat auctoritas, in qua excellentis ingenii uir Papinianus emineat, qui, ut singulos uincit, ita cedit duobus. Notas etiam Paulli atque Ulpiani in Papiniani corpus factas, sicut dudum statutum est, praecipimus infirmari. Ubi autem pares eorum sententiae recitantur, quorum par censetur auctoritas, quod sequi debeat, eligat moderatio iudicantis. Paulli quoque sententias semper ualere praecipimus*. A good deal of discussion has taken place on this law (see Jac. Gothofred. *ad loc.*; Puchta *Rhein. Mus.* v. 141; vi. 87; *Cursus* i § 134; Huschke *Z. G. R.* xiii. 18; &c.). The better opinion is that this law was caused by the difficulty of the courts to know what writers they should admit as authorities, and which they ought to follow in case of differences. There was

probably no list of lawyers who had received license (as Gaius calls it, see p. 102) *iura condere*, and 250 years after Gaius, with scarce and old mss. only to refer to, a judge might well be perplexed by advocates quoting, or perhaps misreading or inventing, ancient authorities. We can see from many passages of Ulpian that authorities were often much divided: the judge might indeed (see Gaius l. c.) follow in that case which he preferred, but most judges would like more definite guidance. The law before us appears to have dealt with all these difficulties. 1. It gives a list of authorities: Papinian, Paul, Gaius, Ulpian and Modestin, who (except Gaius) were in fact the latest of the great jurists. But to these must be added all whose discussions and opinions have been interspersed in the writings of any (*omnes* is not collective) of the above, and particularly Scaevola, Sabinus, Julian and Marcellus. As the habit of citation of predecessors was very prevalent, this brought in a great number of lawyers in addition to the five. 2. Further the law confirms the professional authority (*scientiam*) of all these lawyers, i. e. not merely the particular opinions cited by some of the five, but any of their writings that might be adduced. But a condition is appended. The cited authors were old: and manuscripts professing to be their works might easily be falsified. They would be rarer and therefore more open to accidental or purposed misrepresentation than the later and more usual works of the five. Consequently it is required that the passage adduced by the advocate as the opinion of Scaevola or Julian should be authenticated by the comparison of mss. More than one copy at least must be shewn to contain the passage: on a conflict of testimony the judge would have to decide. (For *collatio* in this sense see Cod. ix. 22. l 22; Cod. Theod. ix. 19. l 2. § 1; and Jac. Gothofred. *ad loc.*) 3. The notes of Paul and Ulpian on Papinian are again disallowed, but, though this part of the constitution of 321 is repeated, the *Sententiae* of Paul are expressly sanctioned. What the effect of the disallowance would be is not clear. Was such an opinion of Paul's or Ulpian's not to be counted at all, even if another jurist agreed? or was it merely meant that Papinian's opinion was not, in consequence of this annotation, to have less than its usual weight? (Cf. *Deo auctore*, § 6.) As regards Gaius see below, ch. XIII. 4. A rule is given for deciding among divergent opinions. The majority decide; if the numbers are equal, a casting vote is given to Papinian's opinion; if his opinion is not given, the judge must himself decide between the authorities.

There can be little doubt that this is what Justinian mainly referred to, and accordingly it is from the writers so indicated that the bulk of the extracts in the Digest are taken. The only authors quoted later than Modestinus, who was himself the latest of the five, are Hermogenianus, Arcadius Charisius, and possibly Julius Aquila and Furius Anthianus. The extracts from the last three are very few, though those from Arcadius are of some length. In what way they are included in Justinian's instructions we do not know, but if Hermogenianus was the author of the collection of Rescripts called *Codex Hermogenianus*, which are referred to by Justinian in his constitutions for making and confirming his own code, we cannot be surprised at his works being used for the Digest.

The juristic literature consisted in ancient as in modern times of writings of different kinds. There were dogmatic treatises, exegetical, casuistical and institutional: in other words there were expositions of the law generally and expositions of a particular subject: there were explanations of the purview of statutes or edicts, and these might be commentaries on a large subject such as the Praetor's edict, or the twelve tables, or on one law of less or greater importance: there were collections of answers given to clients' inquiries, in fact reports of cases, only that the lawyer's opinion took the place now taken by the judge's decision: and there were introductions to the study of the law, short summaries of the principal doctrines, and collections of brief rules or principles for the practitioner's remembrance. Another class yet there was, which in some degree partook of the character of all, questions discussed in lectures with difficulties or new aspects suggested by the pupils, and with the teacher's solutions. The list prefixed to the Florentine ms. gives plenty of examples of each. I name some as samples.

I. DOGMATIC TREATISES. Such were Sabinus's *Ius Civile*, the books on trusts by Pomponius, Gaius, Ulpian and Paul, Gaius on verbal obligations, Venuleius on stipulations and on actions, Ulpian on the office of the proconsul, of the consul, of the praefect of the city, &c., Paul and Callistratus on the law of the *fiscus*, Menander and Macer on military law, Paul on adulteries, on interest, on wills, &c.

II. EXEGETICAL TREATISES. At the head of these stand the largest and most important works of the Roman jurists as we know them, viz. the Commentaries on Sabinus, which may perhaps be



compared with Coke on Littleton; and the Commentaries on the Edict. These practically amounted to complete dogmatic treatises, only with a text of an ancient writer for a starting-point of discussion, instead of definitions or principles of the writer's own. Other exegetical treatises of moment were Gaius on the twelve tables Pomponius on Q. Mucius, Paul and other writers on the *lex Iulia* and *lex Papia Poppaea*, Paul on the *lex Falcidia*, *lex Uellaea*, *lex Cincia*, Marcian on the *S. consultum Turpilianum*, &c.

III. CASES. These form an important part of the literature and head the Papinian series of books. Papinian's, Paul's, Scaevola's, and Modestin's *Responsa* are the principal, but Ulpian and Marcellus both have *Responsa* quoted; Paul's *Decreta*, Gaius' work *de casibus*, Javolen and Pomponius' *Epistulae* belong here; and other works of the same class may lie concealed under more general or ambiguous titles.

IV. INSTITUTIONAL TREATISES. Such were no doubt the Institutes of Gaius, Ulpian, Marcian, Callistratus and Florentin; and though not so elementary, the *Regulae* of Neratius, Scaevola, Ulpian and Modestin; the *Sententiae*, *Manualia* and *Brevia* of Paul; the *Epitome* of Hermogenianus, the *Aurea* (or *Res cottidianae*) of Gaius, the Handbook of Pomponius. Perhaps also the *Definitiones* of Q. Mucius and Papinian, and *Differentiae* of Modestin.

V. DISCUSSIONS. Such were the *Quaestiones* of Papinian, Africanus, Tertullian, and Paul, the *Quaestiones* and *Quaestiones publice tractatae* of Scaevola; the *Disputationes* of Ulpian and of Tryphoninus, and doubtless the *Publica* of Maecian, Marcian, Venuleius, and Macer. To this class belongs, according to Mommsen, the *Digesta* of Julian.

VI. A number of other works, some of them of importance, bear ambiguous titles, so that we cannot refer them with any great probability to one class more than another. Such are the *Pithana* and *Libri Posteriores* of Labeo; the *Uariae lectiones* of Pomponius; the *Membranae* of Neratius; the Pandects of Ulpian and Modestin.

The *Digesta* of Julian, Celsus and Marcellus are similarly ambiguous. Mommsen (*Z. R. G.* vii. 480) holds that by *Digesta* was meant the collected works of an author. He adduces, as evidence of this, the fact that many references are double, both the book of the Digest and the book of an individual treatise being

given, e.g. Gellius VII. (vi) 5 cites a passage from Alfenus' *Digestorum libro xxxiv. coniectaneorum autem secundo*. Again Ulpian quotes Celsus, *epistularum libro undecimo et digestorum secundo*. Further when the *Digesta* of a writer are quoted, other works are not quoted. The books of Julian *ad Urseium* and *ex Minicio* are only apparent exceptions, for they are probably works of Urseius or Minicius, edited with notes by Julian. Scaevola is an exception, for other works of his are quoted besides the *Digesta*. But this is an exception which helps to prove the rule, for many passages are quoted, evidently by an oversight, both from the *Digesta* and from the *Responsa*, &c., so that the contents were to some extent the same; and those jurists who quote the *responsa* or *quaestiones* do not quote the *Digesta*. Marcellus seems however to be a real exception and to go far to break the proof.

The books of Cassius, Urseius, Plautius, and Minicius, which later jurists edited with notes or commented on, are also of an undetermined character.

In the following pages I shall give a brief account of the lawyers named in the extract from Pomponius, which forms D. I. 2. 1 2, and of all others named in the Digest, both those whose opinions or statements are cited, and those from whose writings actual extracts appear. The last class are almost all subsequent to the fall of the republic, Q. Mucius and Aelius Gallus being the only exceptions (unless Alfenus be one), and their contribution is quite insignificant. The republican jurists are however of interest, and some are striking figures. They are sometimes denoted collectively by the writers in the Digest by the term *Ueteres*, whereas those who were officially recognised as law advisers (cf. p. 102) were called *iuris auctores*, cf. D. XLI. 2. 1 3. § 18; II. 4. 1 4. § 2; xxxv. 2. 1 1. § 9; 1 31, &c. (Dirksen *Beitr.* pp. 120 foll.; 164 foll.) With Labeo the series of Digest-jurists worthily opens, but few of the subsequent jurists furnish extracts to the Digest till we come to Trajan's time. After that the series is continuous for about 130 years. There are some others whom we only know at second hand.

The information with respect to many is very meagre. I have given what seemed fairly trustworthy without endeavouring to clothe the skeleton by the aid of doubtful inferences. Fitting's tract *über das Alter d. Schriften d. römischen Juristen* (1860) has been of special service to me, besides the references in Zimmern, Rudorff and

Teuffel-Schwabe's histories<sup>1</sup>. But it is well to bear in mind the nature of the evidence on which the time of composition of the different writings is based. We have rarely any direct knowledge on this point, and are left to glean hints from the extracts of the book so described or inscribed in the Digest. Sometimes such extracts shew distinct acquaintance with a Constitution, the date of which may be otherwise ascertained; or on the contrary shew what appears to be a significant ignorance of such a Constitution. Frequently they quote other writers, which gives at least a relative date. But the most frequent ground for referring a work to a particular time, or for referring parts of a long work to one time and part to another, is the mode in which they mention the emperors. The following is a summary of the results arrived at by Mommsen in his essay *Die Kaiserbezeichnung bei den römischen Juristen* in *Z. R. G.* ix. p. 97 sqq.

The designation of an emperor as *diuus* shews that the work in which it occurs was composed after the death of that emperor. But one cannot safely reverse this and say, that the omission of this title authorises us to conclude that the work was composed in the lifetime of the emperor. Moreover, the rule is applicable properly only to official language. Historians, e.g. Tacitus, and Pliny in his Epistles, do not consistently adopt it. An official document ought to have it, and its absence would be due to carelessness or to transcribers' errors. The jurists adopt it as a rule, but there are instances, relatively few, to the contrary.

On the other hand, the emperor reigning at the time is called *imperator*, more rarely *Augustus* or *princeps*. But it is a secular title and therefore is not attached to a consecrated emperor, now a god. There are some exceptions, most of which may be classed under three heads: (a) A constitution is sometimes given by a writer in its original terms. Then *imperator* is retained (e.g. D. i. 15. 14; xxxiv. 1. 1 13. § 1, &c.): (b) Papinian often omits *diuus* in his *Quaestiones*, but not in his *Responsa*: (c) Ulpian in the first thirty-five books of his Commentary on the Edict in twelve places denotes Severus as *imperator*, in more places as *diuus*. Probably these books were written before, and only imperfectly corrected and published after, the death of Severus, A.D. 211. Some other exceptions are due either to similar want of correction or to carelessness, or to confusion either of author, or scribe, or Justinian's compilers.

<sup>1</sup> Some use has also been made of Hommel and of Anton. Augustin's work *de nominibus propriis Παράδεικτον* (in Otto's Thesaurus, Vol. i.).



Mommsen adds a notice of the mode in which the different emperors called Antoninus (Pius, Marcus, Caracalla) are spoken of by the jurists.

1. Pius is properly *diuus Antoninus Pius*, frequently shortened to *diuus Antoninus* or *diuus Pius*. The jurists who wrote in Marcus' reign, Pomponius, Gaius, Marcellus, call him usually *diuus Antoninus*. Those who wrote after Marcus' death usually call him *diuus Pius*, sometimes *diuus Pius Antoninus* or *diuus Antoninus Pius*.

2. Marcus is properly *diuus M. Antoninus Pius*; by the jurists he is regularly called *diuus Marcus*.

His adoptive brother is officially *diuus Verus*: in the jurists he is sometimes called this and sometimes *diuus Lucius*, most commonly they are spoken of together as *diui fratres*.

3. Caracalla's full name of consecration was *diuus Antoninus Magnus*. No inscription or coin gives him the name of *Magnus* during life. In the jurists *Magnus* always implies that the work was written after his death. His usual name however is *diuus Antoninus*; but, where that was likely to lead to confusion, we have *diuus Magnus Antoninus*. So the father and son are regularly called *diuus Seuerus et Antoninus*.

The simple *diuus Antoninus* is used of all three; the circumstances being generally, though not always, sufficient to say which is meant.

It will readily be seen that, in thus estimating the date at which a work was composed, we are on very unstable ground. Where such use of *diuus* or *imperator* is frequent and consistent, it is fairly trustworthy, but where, as is frequently the case, there are only one or two instances in a work, the inference becomes more doubtful, because accident may have so easily interfered. And the inference from the apparent ignorance of a particular matter, e.g. of a constitution, is hazardous, considering that we have only parts, often short extracts, from most works, that these extracts are the results of free handling of the originals by omission, addition, and revision, and that we can only guess at the purpose of the authors in writing a particular work and know nothing of their process of composition and revision. We have not a single complete work of any ante-Justinian jurist. Gaius's Institutes is the only book approaching to this description. The little tract on the parts of the *as* by Volusius Maecianus, whether complete or not, is hardly in question here. So

that we have to presume the basis of our inferences unaffected (1) by the purpose and method of the author, (2) by the revision of the author, (3) by the transcription of the work before Justinian, (4) by the handling of Tribonian and his colleagues, (5) by the copyists of the Digest. But these are possibilities only of error, and we have daily experience how many such possibilities may exist while yet reports and inferences are substantially true for all that. If excessive scepticism and suspicion would lead to practical paralysis in the affairs of life, there is no reason in deferring too much to a similar temper in matters of history and speculation. But the superstructure cannot but be treated with caution, where the ground is not assured.

The Florentine Index, i.e. the list of authors prefixed to the Digest in the Florentine ms. (see p. xxiv), does not usually give the full name of the author; and the titles of the works sometimes differ slightly from the inscriptions of the extracts. The list is roughly chronological, except that Julian and Papinian, no doubt from their great eminence, are placed first and second in the list.

I give the jurists approximately in chronological order, many however being more or less contemporaries. The division into chapters is necessarily made by a somewhat arbitrary line, and in the case of some jurists the date thus assigned to them is in truth hardly more than a guess.

## CHAPTER VII.

### EARLY JURISTS.

OF the early jurists named by Pomponius in the famous extract from his Handbook, which forms the second law of D. i. 2, some are very little known; others were leading orators and statesmen, others left books on law, which were in the hands of the jurists whose writings contributed to the Digest.

SEX. PAPIRIUS according to Pomponius lived at the time of Tarquinius Superbus, and made a collection of the *leges regiae*, which was called *ius civile Papirianum*. In another place he calls him Publius Papirius (D. i. 2. 1 2. §§ 2, 36). According to Dionysius (III. 36) Gaius Papirius, the chief priest, had the laws and religious regulations, which had become obliterated, put up again in public

after the expulsion of the kings. That some collection of religious or other rules existed under the name of Papirius, is shewn by Granius Flaccus having written a book *de iure Papiriano* (D. L. 16. l 144). See some other notices in Bruns' *Fontes*, p. 3. Cf. Mommsen *Staatsrecht* II. p. 43.

APP. CLAUDIUS, Consul B.C. 451, abdicated on becoming one of the *decemviri* who drew up the Twelve Tables. His descendant was

APP. CLAUDIUS C. F. Caecus. His offices and deeds are recorded in an inscription at Arretium (*Corp. I. L.* i. p. 287, Wilmanns 628). According to this he was 'censor (B.C. 312, Liv. ix. 29), twice consul (B.C. 307 and 296, Liv. ix. 42; x. 16), dictator, thrice interrex, twice praetor, twice curule aedile, quaestor, thrice tribune of the soldiers; he took many towns of the Samnites, routed the army of the Sabines and Tuscans, prevented peace being made with Pyrrhus, paved the Appian road' from Rome to Capua, and 'brought water into the city', from seven or eight miles off on the Praenestine road (Frontin. i. 5), 'erected a temple to Bellona'. The speech which he made in the senate (B.C. 269), when Cineas came as ambassador from Pyrrhus, was extant in Cicero's time (Cic. *Sen.* 6). But his place in the law list is due to his composing forms of actions, (which were afterwards published by Cn. Flavius), and to a book *de usurpationibus* (Pompon. D. I. 2. l 2. §§ 7, 36). Livy (x. 22) calls him *callidus sollersque iuris atque eloquentiae consultus*. Pomponius gives him the name of '*Centemmanus*' and does not mention *Caecus*.

SEMPRONIUS, i.e. P. Sempronius Sophus, consul B.C. 304 (Liv. ix. 45), was elected B.C. 300 one of the first plebeian pontifices after the passing of the Ogulnian law, which App. Claudius opposed; in the next year, censor (Liv. x. 9) and, B.C. 296, praetor. His cognomen was, Pomponius says, derived from his great wisdom (i.e. legal knowledge?).

C. SCIPIO NASICA, according to Pomponius, had a house on the *Sacra via* given him by the public in order that he might be more readily consulted, and was called by the senate *Optimus*. There seems here to be some confusion with the consul of B.C. 191, who was chosen B.C. 204 as the best man in the state to receive the image of the *magna mater* (Liv. xxix. 14). There is also a blunder in the next-named Q. MUCIUS (Q. Fabius Maximus?).

TIB. CORUNCANIUS, from Tusculum (Cic. *Planc.* 8), first avowed himself a public jurisconsult (*primus profiteri coepit*). He was



consul 280 B.C., and the first *pontifex maximus* who was a plebeian (Liv. *Ep.* 18). Cicero calls him *peritissimus pontifex* (*Dom.* 54), and frequently refers to him as a model of legal and general wisdom, e.g. *Or.* III. 33; *Sen.* 6; 9; *Am.* 5; *N. D.* I. 41; II. 66, &c.

SEX. AELIUS, whose cognomen was Paetus, was aedile B.C. 200; consul 198; censor 193 (Liv. XXXI. 50; XXXII. 7; XXXV. 9). He is said by Cicero to have been *iuris quidem civilis omnium peritissimus sed etiam ad dicendum paratus* (*Brut.* 20), is put beside Manilius and P. Mucius (*Or.* I. 48; *Sen.* 9). The same width of instruction is attributed to him as to Manilius (see p. xcvi). A line of Ennius describing him *egregie cordatus homo Catus Aelius Sextus*, 'a man of excellent wits, Aelius Sextus, the shrewd', is often quoted (Cic. *T. D.* I. 9, &c.), and, if Gellius IV. 1. § 20 is right, we must treat *Catus* as an additional name. He wrote according to Pomponius (*D.* I. 2. 1 2. § 38) a work called *Tripertita*, 'which contains the cradle of the law'. It gave in three divisions the text of the Twelve Tables, then an explanation of them, then 'the statutable action', i.e. the form of procedure applicable to the case. He is also said to have increased the forms of procedure as set forth by Appius Claudius and published by his clerk Cn. Flavius, and to have published these additional forms, which were called *ius Aelianum* (ib. § 7). Pomponius mentions three other books which however were of doubtful genuineness (ib. § 38). Crassus in Cic. *Or.* I. 56 speaks of having read something in *Sex. Aelii commentariis*. Whether the *ius Aelianum* and the *commentarii* were different from the *Tripertita* we do not know. Cicero elsewhere calls him an old interpreter of the Twelve Tables (*Legg.* II. 23). Gellius l. c. says that he was of opinion that incense and wax tapers were included under the term *penus*, and hence in *D.* XXXIII. 9. 1 3. § 9 we should correct *Sex. Caecilius* into *Sex. Aelius*.

It is important to distinguish this jurist from Sex. Aelius Stilo, the accomplished philologist and Roman knight (Cic. *Brut.* 56; Suet. *Gr.* 3; &c. Cf. Cic. *Or.* I. 43. § 193 *haec Aeliana studia*, as we read from Madvig's conjecture.

Pomponius speaks of a brother of Sex. Aelius Paetus, viz.

P. AELIUS. The two brothers with P. Atilius ('a mistake for L. Acilius, see Cic. *Am.* 2', Mommsen) are said by Pomponius to have had the greatest knowledge as professed jurisconsults. P. Aelius was successively aedile, praetor, master of the horse, consul, censor, and augur, dying B.C. 174 (Liv. XLI. 21).

M. PORCIUS CATO is mentioned by Pomponius in his account of the jurists, but belongs more to general Roman history than to this special class. He was born at Tusculum B.C. 234, was quaestor in 204, aedile 199, praetor 198, consul 195, and censor 184. He may justly be regarded as a type of the Roman character at the time when our first authentic information begins. Cicero (*Or.* III. 33), Livy (XXXIX. 40), Cornelius Nepos (*Cat.* 3), Quintilian (XII. 11. § 23) sing his praises. With grey eyes, red hair and a strong voice, of an iron constitution and hardy life, thrifty, laborious, straightforward and incorruptible, coarse in habits and feelings, with a vigorous and downright eloquence, and humorous though biting tongue, indefatigable in whatever he undertook, and pushing his own opinions and his country's interests in all directions, eager to attack and ready to reply, farmer and statesman, trader and soldier, orator and lawyer, speaking, writing and studying to the age of 85, he left an abiding impress on Roman character and history. He was accused forty-four times but never condemned (Plin. VII. 100). Cicero had read one hundred and fifty of his speeches; we know the names of 80, and of some have brief fragments (Cic. *Brut.* 16, 17, 85). He wrote the first Roman history in Latin (*Origines* in 7 books), and was indeed the earliest Roman prose writer of whom we have any specimens. His treatise on farming is preserved—as some think, in a later revision. Its contents are very various: the whole duty of the farm-bailiff and his wife; forms of contracts for the sale of produce; an exact inventory of the plant required; charms for dislocated limbs; prayers before harvest and against blight; receipts for making cakes and erecting an olive press, all in brief confident language, mingle with instructions for the economical management of the farm. Cato supported the *lex Cincia* (see p. cxxxvii) in B.C. 204 (Liv. XXXIV. 4. § 9), and unsuccessfully opposed the repeal of the *lex Oppia* in B.C. 195, which, passed in the midst of the second Punic war, restricted the jewels and dress women might wear and the carriages they might use. In B.C. 170 he supported the *lex Uconia*, which limited the share which any citizen enrolled in the first class might leave to any woman (Gell. XVII. 6; Cic. *Verr.* Act. I. 41, 42; Gai. II. 274).

As regards law Cicero calls him *iuris civilis omnium peritissimus* (*Or.* I. 37), that is, of his time, and similar expressions are used by others. Pomponius (D. I. 2. 1 2. § 38) speaks of books of his, apparently on law, being extant in his time, but adds that there are more

of his son's. Cicero introduces him in the *de Senectute* in his 84th year occupied among other things in dealing with *ius augurium*, *pontificium*, *ciuile* (*Sen.* II. § 38), and in *Or.* II. 33 speaks of books of Cato and Brutus, which gave law cases with the actual details and the answers of the jurist. But this last reference may belong really to his son.

CATO THE YOUNGER, son of Cato Censorinus by his first wife, died when Praetor designate in his father's life time, and left *egregios de iure ciuili libros* (Gell. XIII. 20. § 9). The references in the Digest are supposed to relate to this son; D. XXI. 1. 1 10. § 1 (Ulpian) *Catonem quoque scribere lego*; XXIV. 3. 1 44. pr. (Paul) *Nerua et Cato responderunt, ut est relatum apud Sext. Pomponium digestorum ab Aristone libro quinto*; XLV. 1. 1 4 (Paul) *Cato libro quinto decimo scribit*; L. 16. 1 98. § 1 (Celsus) *Cato putat mensem intercalarem*, &c. So *Inst.* I. 11. § 12 *Apud Catonem bene scriptum refert antiquitas*. The famous *Catoniana regula* is probably the son's. It was a rule that what would not be a valid legacy, if the testator died directly his will was made, was not valid whenever he died. See D. XXXIV. 7; XXXIII. 5. 1 13; XXXV. 1. 1 86.

BRUTUS, whose full name was *M. Junius Brutus*, is mentioned by Cicero as *iuris peritissimus* (*Brut.* 34. § 130; *Off.* II. 14. § 50) and by Pomponius (D. I. 2. 1 2. § 39) as one who with P. Mucius and Manilius *fundauerunt ius ciuile*. He attained the rank of praetor. Cicero speaks of his and Cato's books as giving not only the answers of the jurisconsults to the bare point of law, but the exact details of the cases as well (*Or.* II. 33); and we hear of discussions which took place between him and other lawyers of the time. Thus the citizenship of C. Mancinus, who had been surrendered by the fetials to the Numantines but not received by them, was denied by P. Rutilius and P. Mucius, and apparently was maintained by Brutus (D. XLIX. 15. 1 4 *inter Brutum et Scaeuolam uarie tractatum est*; L. 7. 1 18 (17); Cic. *Or.* I. 40). Another discussion in which Brutus took part is named by Cic. *Fam.* VII. 22, and turned upon the use of the future tense. The lex Atinia said *Quod subreptum erit, eius rei aeterna auctoritas esto*. 'Title to a thing which has been stolen is eternal', i. e. is not affected by a stranger's having possessed it for a length of time which would otherwise have made him owner by usucapion. Did the use of the future *erit* restrict the application of the law to things stolen subsequently to the law of Atinius? What the decision was, we are not told (Gell. XVII. 7; cf. D. XLI. 3. 1 4. § 6). The truth is, the



tense *erit* is properly subordinate to the imperative *esto* (*Lat. Gr.* § 2. 1481, 1495, 1603). The question whether it would apply to things stolen before the Act is rather one to be determined, in the absence of express words, by the usual practice in legislative matters. *Subreptum est* would have been wrong in strict grammar, unless, which would be most unlikely, the law were meant not to apply to future acts of stealing.

Labeo recorded a saying of Brutus that a man who had borrowed a beast of burden and used it otherwise than had been agreed on, i. e. had used it for a different journey or for a longer journey, was found guilty of theft (*Gell.* vi. (vii.) 15; cf. *D.* xlvii. 2. 1 77 (76) pr.). Another discussion is mentioned in *Cic. Fam.* vii. 22 (see under Trebatius). His opinions are also mentioned in *D.* vii. 1. 1 68 (on which see my note); ix. 2. 1 27. § 22; xviii. 2. 1 13, *Celsus refert Mucium Brutum Labeonem, quod Sabinum, existimare*; xli. 2. 1 3. § 3, *Brutus et Manilius*.

His work *de iure civili* was in three books. All the books commenced with Brutus' mentioning the presence of his son and himself in a country villa—different in each. Crassus, in defending Plancus against an accusation brought by Brutus' son, laid hold of this in order to reflect on the accuser's character, who had run through all the property left him by his father (*Cic. Clu.* 51; *Or.* ii. 55). In the latter passage the words *nisi puberem te iam haberet, quantum librum composuisset, et se etiam in balneis lotum cum filio scriptum reliquisset* clearly indicate that there were only three books, and Scaevola is there reported to have said that there were only three genuine books. Hence the text of Pomponius (*D.* i. 2. 1 2. § 39) should be corrected by transposition of Manilius and Brutus (Maiani. i. pp. 115, 128, followed by Mommsen and others). The Brutus to whom Serv. Sulpicius addressed his short exposition of the edict (*D.* i. 2. 1 2. § 44; xiv. 3. 1 5. § 1) must have been later.

MANILIUS, whose full name, as given in the *Fasti Capit.* (*Corp. I. L.* i. p. 438), was *M'. Manilius P. F. P. N.* was consul with L. Marcius Censorinus in 149 B. C. (*Cic. Brut.* 15. § 61, &c.), and in that capacity commenced the siege of Carthage, the younger Scipio Africanus being tribune of the fourth legion (*Cic. Somn. Scip.* i.). Manilius was in command of the land forces (*App. Lib.* 75). He is frequently mentioned as a lawyer by the side of Sex. Aelius, Brutus, and P. Mucius (*Cic. R. P.* i. 13; iii. 10; *Fam.* vii. 10; *Or.* i. 48;

*Caecin.* 24). He had an estate in the neighbourhood of Labicum, and lived in a small house in the Carinae (Cic. *Par.* 6. § 50), i.e. the western part of the Esquiline, where the temple of Tellus was. Crassus is made by Cicero (*Or.* III. 33) to say, in speaking of the wider studies of the men of former times, that he had himself seen Manilius strolling (*ambulantem*) across the forum, which was a sign of his being willing to advise any citizen who desired it: and that, both then and when he was sitting at home, men came to consult him, as they did Sex. Aelius, not only on points of law but on the marriage of their daughters, and the purchase of land, and any other matter of duty or business. Cicero introduces Manilius as an interlocutor in the *de Republica*, describing him as *uir prudens omnibusque illis et iucundus et carus*, the others (*illis*) being Scipio Africanus the younger, Q. Aelius Tubero the Stoic, C. Laelius (cf. Cic. *Brut.* 21, 22), P. Rutilius (see p. ci), Q. Mucius Scaevola the augur, and others. As a business speaker Cicero puts him nearly on a par with P. Mucius (*P. Scaeuola ualde prudenter et acute loqui putabatur, paulo etiam copiosius; nec multo minus prudenter M. Manilius*, where *prudenter* denotes competence to deal with the matter in hand, especially from a legal point.

He is mentioned by Gellius (XVII. 7) in the discussions about the *lex Atinia* (see under BRUTUS, p. xcvi); about the heir bringing an action for theft (Cic. *Fam.* VII. 22, see p. cxix); about treasure-trove (D. *XLI.* 2. 1 3. § 3); about children being *fructus* (Cic. *Fin.* I. 4; D. *VII.* 1. 1 58, see note, p. 240). Varro (*L. L.* VII. 105) quotes from him a definition of *nexum* as *omne quod per aes et libram geritur, in quo sunt Mancipia*. Mucius' definition runs *quae per aes et libram fiant ut obligentur, praeter quae Mancipio dentur*, Manilius thus making *nexum* the genus of which *mancipium* is a species, Mucius making them both species of the genus *quod per aes et libram geritur*. Aelius Gallus defined *nexum* as simply *quodcunque per aes et libram geritur* (*Fest.* p. 165), which would therefore agree with Manilius. It is quite possible that *mancipium* and *nexum* may have meant much the same originally, but that *mancipium* was gradually applied only to one class of cases and *nexum* to the others.

Manilius drew up several *formulae* for stipulations on the sale of slaves and animals: so Varro *R. R.* II. 3. § 5 *Stipulantur paucis exceptis uerbis: ac Manilius scriptum reliquit sic 'Illas capras hodie recte esse, et bibere posse, habereque recte licere, haec spondesne'*; ib. 5. § 11; *paulo uerbosius haec, qui Manilii actiones sequuntur*;

7. § 6 (some mss. have *mamilii*); and Cic. *Or.* i. 58 speaks of *Manilianas uenaliū uendendorū leges* (where see Wilkins). Pomponius speaks of three, or rather (if we correct the reading, see p. xcvi) seven books *de iure ciuili*: and says that some of his writings were still extant.

P. MUCIUS SCAEVOLA, the father of the still more celebrated lawyer Q. Mucius *pontifex*, and first cousin of Q. Mucius the augur, was tribune of the commons 141 B.C. (Cic. *Fin.* ii. 16), and in that capacity got an inquiry ordered into the conduct of L. Tubulus, the praetor of the previous year, who was charged with taking bribes when trying cases of murder. L. Tubulus went into exile at once without waiting for trial. P. Mucius was praetor B.C. 136 (Cic. *Att.* xii. 5), and was consul with L. Calpurnius Piso Frugi in 133, the year of Tiberius Gracchus' famous legislation and death. Mucius was said to favour the legislation (Plut. *Tib. Gr.* 9; Cic. *Acad.* ii. 5). When, on the election to the tribunate for the following year, the opponents of Gracchus proposed in the senate that he should be at once put down as a tyrant, the consul Mucius declared that he would not commence the use of violence, nor put a citizen to death untried, but that he should not regard as valid any unconstitutional measure which Gracchus might get the people to vote. Scipio Nasica exclaimed that, as the consul by clinging to the law was bringing both laws and Rome together to destruction, those who wished to save their country should follow him: and Gracchus was attacked and killed (Val. Max. iii. 2. § 17; Plut. *Tib. Gr.* 19). It was afterwards proposed that Nasica's conduct should be submitted to the judgment of P. Mucius. Nasica declined, saying that he was *iniquus*. On protests being uttered against such a charge, Nasica replied that he did not mean that he was unfair to *him*, but to all; apparently intimating that Mucius had betrayed his country's interests by not acting against Gracchus (Cic. *Or.* ii. 70). Mucius afterwards took part in decrees conferring honours on Nasica, and pronounced that he had in good right (*iure optimo*) taken up arms (Cic. *Planc.* 36; *Dom.* 34). His name is concerned in a question of law connected with C. Gracchus, which is recorded in the Digest (xxiv. 3. 1 66). Some property belonging to the dowry of Licinia, wife of C. Gracchus, was destroyed in the tumult in which her husband was killed. P. Mucius, uncle of the lady, held that the husband's estate was answerable, because the tumult had arisen from his fault. (The



facts of the case are however somewhat difficult, as Plutarch says (*C. Grac.* 17) that the property of Gracchus and his friends was confiscated and Licinia's dowry also.) He was judge (*iudex*) in a case of libel (*iniuriarum*) upon the poet L. Accius and condemned the defendant (*Cornif.* II. 13).

P. Mucius was *pontifex maximus* from the year 123 B.C. at latest; for in that year he gave a decision that ground dedicated by a Vestal virgin without the order of the people was not consecrated (*Cic. Dom.* 53). Other ecclesiastical decisions of his are recorded.

In the case of a man killed on board ship and thrown into the sea, he decided that the estate (*familia*) was pure, because the face (*os*) was not above ground, but that certain sacrifices must be performed by the heir. If the man had been drowned the sacrifices would not have been required (*Cic. Legg.* II. 22).

In Cicero's *de Legibus* II. 19—21 is an account of the ecclesiastical law on the devolution of the *sacra*. They shew the difficulties, which arose in the maintenance of family rites and sacrifices, when a deceased's estate was divided among several heirs and legatees, or was not entered on at all, or was divided among creditors. But these difficulties were met by rules of the priests, not by laws of the state. The priests were familiar with civil, as well as with sacred, law, and used their knowledge of the former to discover means of evading religious obligations. One ingenious method was for the legatee to give the heir a formal acquittance in full, but at the same time to stipulate for the payment of the same amount or thing. The *sacra* being attached only to the devolution by death did not attach to property received in discharge of a purely civil verbal obligation. Both Scaevolae, father and son, are mentioned by Cicero in this passage, and very likely may have each in turn developed the system of devolution to meet fresh difficulties. Savigny has an interesting article on it, *Verm. Schr.* I. p. 151 sqq.

Augustin (*Civ. D.* IV. 27) ascribes to 'the learned pontifex, Scaevola', who was followed by Varro, the division of gods into three classes, those of poets, of philosophers, and of statesmen, of which the first class was injurious, and the second partly injurious, partly superfluous, the line of objection taken being the same which Plato takes in the second book of the *Republic*. (See Mayor on *Cic. N. D.* I. § 61.) Which Scaevola, father or son, is meant we do not know.

His opinions on some matters are recorded, often along with those

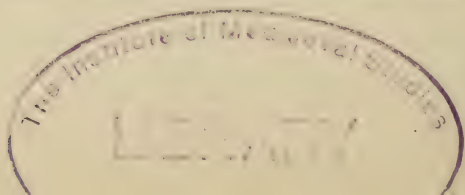
of his contemporaries Brutus and Manilius. For the question whether *partus ancillae in fructu sit* see note below, p. 240; for that of the possibility of theft from an inheritance not yet entered on, see Cic. *Fam.* VII. 22 and D. XLVII. 4. 1 1. §§ 10, 15; for the *lex Atinia* Gell. XVII. 7 and above p. xcv; for the question, whether a Roman, given up to the enemy but not received by them, retained his Roman citizenship, see D. XLIX. 15. 1 4; L. 7. 1 18. (71); cf. Cic. *Or.* I. 40. Mucius held that he did not retain his citizenship. His definition of the *ambitus* of a house is given in Cic. *Top.* 4; and of *gentiles* ib. 6. *Gentiles* are such as are of the same name, freeborn, of ancestors who have been always free, and they must not be *capite deminuto*. Pomponius (D. I. 2. 1 2. § 39) says he left ten books, and Crassus his brother is said (Cic. *Or.* I. 56) to have referred to his *commentarii* ('note-books'?).

He is stated by Mommsen (*Hist.* Bk. IV. Chap. 13) to have compiled the chronicles of the city in 80 books and published them. This is an inference from Cicero's statement (*Or.* II. 12) that up to Mucius' time the *pontifex* kept a chronicle on a slab at home, and from the statement of a scholiast (Servius?) on Vergil *Aen.* I. 377 that such a publication in 80 books was made.

P. Mucius was a thorough jurisconsult (Cic. *Or.* I. 48) and a good speaker; *loquebatur ualde prudenter et acute, paulo etiam copiosius* (Cic. *Brut.* 28): and was also famed as an excellent player both at ball and backgammon (*pila et duodecim scriptis*, Cic. *Or.* I. 50, where see Wilkins' notes).

P. LICINIUS CRASSUS MUCIANUS was own brother of P. Mucius, but adopted by the rich Crassus (consul 205 B.C.). He is often named as a lawyer by Cicero (*Or.* I. 37; *Brut.* 26; &c.). Gellius (I. 13. § 10) relates that he was renowned as having five of the greatest advantages: he was *dilissimus*, *nobilissimus*, *eloquentissimus*, *iurisconsultissimus*, and *pontifex maximus*. He was consul B.C. 131, and sent to Asia to conduct the war against Aristonicus, son of Eumenes, and was killed in the war in that or the next year (Cic. *Phil.* XI. 8; Vell. II. 4. § 1). Two anecdotes of him are told in Val. Max. III. 2. § 12; Gell. *l. c.* Pomponius (D. I. 2. 1 2. § 35) confuses him with the great orator, Lucius Crassus (see p. cvi), and misplaces him in the order of jurists. He is not said to have left any writings.

Q. TUBERO, i.e. Q. Aelius Tuberus the Stoic; consul B.C. 118, is mentioned by Pomponius (*Quintus Tuberus ille stoicus Pansae*



(*Panaeti?*) *auditor* (D. I. 2. 1 2. § 40); and by Cicero as a learned lawyer (Cic. *ap. Gell.* I. 22. § 7). He is said as tribune to have decided against the evidence of his uncle P. Africanus that augurs were not exempt from service as *iudices* (*Brut.* 31).

Q. MUCIUS Q. F. Q. N. SCAEVOLA the augur, consul 117 B.C. died between 88 and 82 B.C. (Val. Max. III. 8. § 5, Cic. *Am.* 1). He is described by Cicero as not a great orator but a great lawyer *Brut.* 26. § 102; and a very genial man *ib.* 58. § 212; *Or.* I. 35, &c. see Wilkins' *Introd.* p. 91. He is not named by Pomponius.

RUTILIUS, i.e. *P. Rutilius Rufus*, was born somewhere about the year 158 B.C., being described as *adulescentulus* in B.C. 138 (Cic. *Brut.* 22). Brought up in intimacy with P. Mucius Scaevola, he was a conspicuous figure among the Romans of his time, both for knowledge of law and still more for his upright character. In 134 B.C. he was with Scipio at Numantia as tribune of the soldiers (Cic. *R. P.* I. 11; App. *Iber.* 88), probably selected by Scipio. He must have been at some time an unsuccessful candidate for the tribunate of the Commons (Cic. *Planc.* 21), and hence could hardly be the P. Rutilius mentioned in Cic. *Or.* I. 40 as having turned out of the senate C. Hostilius Mancinus. He was B.C. 116 a candidate for the consulship against Aemilius Scaurus, and was unsuccessful. He accused Scaurus of bribery, and Scaurus was acquitted. Whereupon he retorted and accused Rutilius of bribery, producing as evidence of it Rutilius' account-books, in which the letters A F P R appeared. Scaurus interpreted them to mean *actum fide P. Rutili*, i.e. that he had guaranteed a payment by way of bribe. Rutilius said they were merely for *ante factum post relatum*, i.e. a memorandum, that the date of the entry was subsequent to the date of the transaction. (A similar form is found in Fronto, *ad Ant. Imp.* I. 5 p. 102 Naber, *ante gestum post relatum aiunt, qui tabulas sedulo conficiunt.*) Curius, who was assisting in Rutilius' defence, wittily exclaimed that neither was right: the letters really meant, *Aemilius fecit, plectitur Rutilius*. The issue of the trial is not known. In 108 he was legate to Metellus in Africa in the campaign against Jugurtha (Sall. *Jug.* 50, 52, 86). In 105 B.C. he was consul with Cn. Mallius Maximus, who was defeated by the Cimbri (Liv. *Ep.* 67). Rutilius is mentioned by Frontinus as having let his son serve in the ranks instead of attaching him, as he was entitled, to his own person (Front.



*Strat.* iv. 1. 12). The campaign we do not know. In the disturbances caused by Saturninus B.C. 100 he, with Q. Scaevola the augur and others, took up arms at the call of the senate (*Cic. C. Rab.* 7). About 98 B.C. he went as legate (Pomponius says wrongly *proconsul*) to Q. Mucius Scaevola (pontifex) to Asia, of which province Scaevola was made governor. The stern and upright justice between the provincials and the Roman tax-farmers, which made this governorship so memorable, was avenged by the tax-farmers on Rutilius. He was put on his trial some time between 95 and 92 B.C. (the dates of Crassus' consulship and censorship, cf. *Cic. Brut.* 30, where Crassus is called *consularis*) for extortion, and as the *equites*, the moneyed classes, then were the *iudices*, the issue of the trial was viewed with great apprehension by his friends. Rutilius declined the aid of the powerful orators L. Crassus and M. Antonius: he would have no impassioned appeal to the feelings of the court; he would make his defence consist in the simple truth, plainly stated, without exaggeration or rhetorical art. Accordingly he spoke in his own defence, and Q. Mucius spoke for him, but the only words of real oratory were a few which Rutilius allowed his nephew Cotta to say (*Cic. Brut.* 30). Thus, says Cicero, the man who was as innocent as he was learned, than whom Rome had none more honest and more good (*neque integrior, neque sanctior*), was condemned, because oratory was not put to its proper use, and the case was pleaded as if Rome were Plato's republic (*Cic. Or.* i. 53). He went into exile, and with a fine confidence chose Asia. The towns, eager to shew the injustice of the accusation, sent deputations to greet his arrival (*Val. Max.* ii. 10. § 5). We hear of him in Mitylene in B.C. 88 (*Dio Cass. Fr.* 97) when Mithridates came there, and orders were given to put all Romans to death (*App. Mithr.* 22, 23)<sup>1</sup>. Rutilius avoided the common fate by putting on Greek dress (*soccus et pallium Cic. Rab. Post.* 10). It was with him scarcely an evasion. He had adopted Asia as his home and country. He became a citizen of Smyrna (*Cic. Balb.* 11), and Cicero saw him there B.C. 78, and, as he says (*R. P.* i. 8; 11), heard from him then the conversation which Cicero afterwards embodied in his books *de Republica*. When some one endeavoured to console him with the thought of a civil war approaching when all exiles would be recalled,

<sup>1</sup> A story of Theophanes that Pompey found in a fort among Mithridates' papers, a speech of Rutilius urging the destruction of the Romans was disbelieved by Plutarch (*Pomp.* 37).

Rutilius answered, 'What ill have I done you that you should wish me a return worse than my departure? I would sooner my country should blush at my banishment than mourn at my return' (Sen. *Ben.* vi. 37). P. Sulla, probably the Dictator's nephew, proposed to recall him, but he declined (Quintil. xi. l. § 13). Ovid, smarting under the dreariness of Tomi, accounts for Rutilius' patience by the fact that Smyrna was as pleasant a residence as could be found (*Pont.* i. 3. 63).

Cicero is never tired of praising the man and mourning his loss. His character and exile became a stock example cited by Seneca frequently along with Regulus, Socrates, and others (e.g. *Dial.* iii. 3. § 4, &c.). He was *documentum hominibus nostris virtutis, antiquitatis, prudentiae* (Cic. *Rab. P.* 10): he was *uir non sui saeculi sed omnis aevi optimus* (Vell. ii. 13). He had attended Panaetius' lectures (at Athens?), and might be described as a thorough master of the Stoic system; he was skilled in Greek literature; by natural disposition vehement and ready to attack; much occupied as a professed jurisconsult, and yet always ready to spend time and trouble as an advocate in the courts. His style of speaking was severe and pointed, but too thin to be popular or persuasive (Cic. *Brut.* 30; D. i. 2. l. 2. § 40). Though the identity is not positively established, there is little doubt that he is the Rutilius or P. Rutilius of whom the following facts are recorded.

He made a speech *de modo aedificiorum*, which Augustus published to shew that his own plans were in accordance with those advocated by great Republicans (Suet. *Aug.* 69). It appears Augustus ordered that no one should build near the public streets to a greater height than 70 feet (Strab. v. 7, p. 235). This is no doubt what Suetonius alludes to (Maiani. ii. p. 16). He passed a law relating to the position of those tribunes of the soldiers who were nominated by the general instead of elected by the people. From him they were called *Rufuli* (Liv. vii. 5. § 8; Festus p. 261; cf. Marquardt, *Staatsverwalt.* ii. p. 354). As praetor (we are not elsewhere informed of his holding the office) he made two important reforms. 1. The first related to the sale of the property of debtors who being insolvent or fraudulent or obstinate had not satisfied their creditors after judicial process, or who had died without leaving any legal representative (Gai. iii. 78 sq.). Rutilius is said to have introduced this sale of their property as a whole, probably on the analogy of the *sectio bonorum* to which state debtors were liable; and to

have improved the formula, by which the purchaser in such a case prosecuted his rights. This used to be by means of a fiction, that the *bonorum emptor* was entitled just as if he had been the former owner. Rutilius drew the formula differently. He made the statement of claim (*intentio*) run directly in the name of the former owner, and inserted the name of the purchaser in the condemnation clause as the person entitled to the judgment (ib. iv. 35: cf. Puchta § 179, Kuntze § 274 and the references there given). 2. The second reform of Rutilius was to put a check on the excessive demands made by patrons upon their freedmen. He refused to patrons actions against their freedmen, except to enforce performance of due services (*operae*, see D. xxxviii. 1), and to give effect to a bargain made by the patron for his admission as partner in his freedman's property (D. xxxviii. 2. 1 1; ib. 1. 1 2), in default of due respect (*obsequium*, see D. xxxvii. 15).

His opinion is cited in the Digest vii. 8. 1 10. § 3; xxxiii. 9. 1 3. § 9; xliii. 27. 1 1. § 2. From Gellius iv. 1. § 22 we may infer that the opinion, attributed to Rutilius in D. xxxiii, was reported by Sabinus, from whom Ulpian probably took it, as well as many other opinions, at second hand.

Rutilius wrote an autobiography in Latin, and also a history in Greek. The few fragments and references preserved are collected by H. Peter *Hist. Rom. Frag.* pp. 122—124 *ed. min.*

DRUSUS is quoted once in the Digest (xix. 1. 1 38. § 1) by the side of Sextus Aelius. Possibly he is the blind jurisconsult, whose house Cicero says was filled by clients (*T. D.* v. 38: cf. Val. Max. viii. 7. § 4).

Of the others named by Pomponius, between Rutilius and Quintus Mucius the pontifex,

PAULUS (AULUS?) VIRGINIUS is not otherwise known. Probably he is the same as A. Virginus mentioned along with Rutilius in Cic. *Lael.* § 101.

SEXTUS POMPEIUS was brother of Cn. Pompeius Strabo, and uncle of Cn. Pompeius Magnus. Cicero says of him *praestantissimum ingenium contulerat ad summam iuris ciuilis et ad perfectam geometriae et rerum Stoicarum scientiam* (*Brut.* 47).

CAELIUS ANTIPATER lived about the time of the Gracchi, and wrote a history of the second Punic war in seven books. The frag-



ments now remaining are collected by H. Peter, pp. 98—108. His claims as a lawyer are simply those of Cicero's mention in *Brut.* 26 *Caelius Antipater scriptor, quemadmodum uidetis, fuit ut temporibus illis luculentus, iuris ualde peritus, multorum etiam, ut L. Crassi, magister.* From Cicero, doubtless, Pomponius took his name.

## CHAPTER VIII.

### JURISTS OF CICERO'S TIME.

Q. MUCIUS, whose full name was *Q. Mucius P.F. P.N. Scaeuola*, commonly distinguished as Pontifex from *Q. Mucius Q.F. Q.N. Scaeuola*, the Augur, who was his father's first cousin, is the earliest lawyer whose writings were used in the Digest. Son of a distinguished lawyer, he maintained the family traditions as man, as statesman, and as jurist. He was tribune of the Commons in 106 B.C. (*Cic. Brut.* 43. § 161), and curule aedile with L. Licinius Crassus the great orator in 104 B.C., when they exhibited splendid games (*Cic. Off.* II. 16. § 57). Scaeuola is particularly mentioned by Pliny (*H. N.* VIII. § 53) as having been the first to exhibit at Rome a fight of several lions at once. About the year 98 B.C. (Mommsen *Gesch.* II. p. 211, ed. 7) Scaeuola (then praetor, *στρατηγός*?) was governor of Asia. He took with him as legate P. Rutilius, and, though his governorship lasted only nine months (*C. Att.* v. 17. § 5), its fame was long lived. He discharged his expenses from his own means, and administered rigorous justice between the provincials and the tax-farmers, while declining to nominate any of his own staff as *iudices* to try the cases. Those condemned were compelled to refund, and those guilty of capital crimes were executed. In particular one of the leaders, though offering large sums for a release, was at once crucified (*Diod. Sic.* xxxvii. 6—8; *Cic. Verr.* II. 13. § 34). The senate approved his action so as to treat it as a model for future governors of Asia (*Val. Max.* VIII. 15. § 6), and the provincials kept afterwards a festival (*Mucia*) in his honour (*C. Verr.* II. 22. § 51). The publicans and their friends, the Equites, so bitterly resented his conduct (cf. *Cic. Planc.* 12. § 33), that selecting Rutilius for attack they put him on trial for extortion, and, having the constitution of

the courts, condemned him to banishment (see above, p. cii). Scaevola defended him, as Cicero says, *more suo, nullo apparatu, pure et dilucide*, but without the vigour and impressive eloquence which alone could have prevailed in such a case (Cic. *Or.* i. 53. § 229; *Brut.* 30. § 115). Meantime Scaevola had been consul with L. Licinius Crassus in 95 B.C. (*Brut.* 64. § 229), and the two carried a law which met the claims of the Italians to full Roman privileges, not with politic concession, but with a disastrous legal pedantry. The *lex Licinia Mucia de civibus regundis* (cf. *finium regundorum iudicium*) treated the claims of Italians to Roman citizenship as a lawyer might treat attempts at encroachments on neighbours' land. Each was to be citizen of his own state, and forbidden to claim or exercise the rights of another (Cic. *Corn.* 67 and Ascon. *ad loc.*; *Off.* iii. 11. § 47). The social war broke out five years afterwards.

Scaevola was made *Pontifex Maximus*, but when, we do not know. At the funeral of C. Marius, B.C. 86, C. Flavius Fimbria, one of his violent adherents, endeavoured to have Scaevola assassinated. He was wounded, but not fatally; whereupon Fimbria gave him notice of trial, and the charge being asked, declared that it was for having only half received the thrust of the dagger (Cic. *Rosc. Am.* 12. § 33). Four years later the Marians effected their object. In B.C. 82 Damasippus, on instructions from the younger Marius then shut up in Praeneste by Sulla, attacked and killed Scaevola (amongst others) before the statue of Vesta, or, as some say, in or near the *Curia Hostilia* (Cic. *Or.* iii. 3. § 10; *N. D.* iii. 32. § 80; Vell. ii. 26; App. *B. Civ.* i. 88).

Scaevola and Crassus were often opposed to each other as advocates. Cicero (*Brut.* 42. § 155) says Scaevola readily accepted the position, though Crassus surpassed him, while Crassus was not willing to give opinions on law cases, knowing Scaevola to be his superior. In one celebrated case, *M. Curius v. M. Coponius*, which Cicero frequently mentions (*Or.* i. 39. § 180; *Brut.* 39. § 145; 52. § 194 sqq.; *Caecin.* 18. § 53), M. Curius was appointed heir, provided that testator's posthumous child should die before he came of age. No posthumous child was born. Scaevola argued before the *centumviri* that the will must be strictly followed, and, that, the conditions having failed, Curius had no claim. Crassus maintained successfully that the testator must be taken to mean that Curius should inherit, if there were no child who lived to be of age. Cicero says the pleadings were so admirable that Scaevola was thought the

best orator of all lawyers, Crassus the best lawyer of all the orators (*Brut.* § 143). Crassus is made by Cicero in the *De Oratore* politely to give both distinctions to Scaevola. Both excelled in stating a case and explaining its legal and equitable bearings, but in some respects were contrasts to one another. No one more copious than Crassus, no one more apt and concise than Scaevola. In setting off a case with illustrations and refuting his opponent Crassus shewed the resources of a brilliant orator; Scaevola was rather a clear expositor and formidable critic. Crassus was humorous but dignified; Scaevola severe though not without a touch of humour (*Brut.* §§ 143—148). He left some orations behind him (*ib.* § 163).

Cicero was a pupil of Scaevola the augur, and on his death attended the pontifex, whom he calls the most distinguished man in the whole state for ability and uprightness (*Cic. Am.* I.). An illustration of his character is given in the *De Officiis* (III. 15. § 62). Scaevola was buying an estate and requested the seller to name his price once for all. He did so: Scaevola said the estate was worth more, and paid 100,000 sesterces (about £850) more than the price asked. Good faith in all the business of life was with him, as man and as lawyer, the main object of consideration. In his edict for the province of Asia he had a clause, which Cicero borrowed, allowing want of good faith to be pleaded against the validity of a transaction (*Habeo exceptionem ex Q. Mucii P. F. edicto Asiatico 'extra quam si ita negotium gestum est, ut eo stari non oporteat ex fide bona'* *Cic. Att.* VI. 1. § 15). Scaevola was in the habit of saying that those actions (*arbitria* cf. pp. 58—60) were of the most searching and exhaustive character in which the formula contained the words 'in good faith'; that good faith had the widest possible application: it affected the relation of guardian and ward, of partners, of trustee and *cestui que* trust, of principal and agent, of buyer and seller, letter and hirer, and that, as there might be cross suits, it required a great judge to decide the mutual obligations of the parties (*Cic. Off.* III. 17. § 70). He composed an oath to be taken by any one who adopted a *paterfamilias*. The adopter was to swear that he was too old to marry and had not in the adoption any improper design upon the property of the proposed arrogatee (*Gell.* v. 19. § 6, see my note, p. 165). Another result of his practical skill survived in the Justinian law. A testator gives a man something on condition of his not doing this or that. The fulfilment of the condition cannot be ascertained till he is dead, and then the legacy is of no use. Scaevola



said the legatee should be entitled to the legacy on giving to the party entitled in default a bond to repay the legacy, if he broke the testator's conditions. This bond was called *Muciana cautio*, D. xxxv. i. 17; 118; 172. §§ 1, 2; 173; &c.

Pomponius (D. i. 2. 12. § 41) names as Q. Mucius' pupils, Aquilius Gallus, Balbus Lucilius, Sextus Papirius and Gaius Juventius. Mucius was the first to write a systematic treatise on the civil law, treating it in 18 books (*ius civile primum constituit generatim in libros decem et octo redigendo*). In the Florentine Index he is named third (after Julian and Papinian), and the work given is one book of definitions (*ῥῆσιν*). From this book there are in the Digest four short extracts, D. xli. 1. 164; xliii. 20. 18; l. 16. 1241; 17. 173. There are also 50 citations of him (by the name of Q. Mucius, except D. xvii. 1. 148; xlix. 15. 14 where he is called Scaevola), two at least being from the *Ius Civile*, D. xxxiii. 9. 13. pr.; xxxiv. 2. 127; cf. xvii. 2. 130. Some fragments are found in Gellius and elsewhere. They are collected in Huschke's *Ius anteiusi*. The rules for the devolution of the *sacra* seem more properly referable to P. Scaevola, the father of Q. Scaevola, pontifex (see above, p. xcix).

His works received commentators. Servius Sulpicius made notes or criticisms on them, cf. D. xvii. 2. 130 *Servius in notatis Mucii ait*; Gell. iv. 1. § 20 *Servium Sulpicium in reprehensis Scaevolae capitibus scripsisse*. Gaius edited or commented on them (Gai. i. 188 *in his libris quos ex Q. Mucio fecimus*): and Pomponius wrote *lectiones ad Q. Mucium* in 39 books, to which no doubt belong D. xli. 1. 1153, 54, which are now by the inscriptions assigned to Modestin. The extracts from this work of Pomponius are numerous, and fill 13½ of Hommel's pages. Quotations from Q. Mucius occur in other extracts, e.g. xxxiii. 1. 17; xxxiv. 2. 134. Gellius (xv. 27) mentions also a work in several books of Laelius Felix *ad Q. Mucium*.

Of the pupils of Q. Mucius only C. Aquilius Gallus is well known (see below).

L. LUCILIUS BALBUS had the credit, along with Aquilius, of being the teacher of Serv. Sulpicius (Cic. *Brut.* 42; Pompon. D. i. 2. 12. § 43). Cicero calls him learned and well trained, but somewhat slow and deliberate. See also Cic. *Quinct.* 16. § 53; 17. § 254.

SEXT. PAPIRIUS and C. JUVENTIUS are not otherwise known than from Pomponius, who names them as among the principal pupils of Q. Mucius.

C. AQUILIUS<sup>1</sup> GALLUS was a thorough lawyer, devoted to the study and practice of his craft both by taste and ability. It is characteristic of him that the only state office which we know him to have held, was that which became the symbol and organ of the law itself—the praetorship, which he held at the same time as Cicero B.C. 66. For the consulship in the next year he declined to stand, alleging ill health and his occupation in the law courts (Cic. *Att.* i. 1 *Aquillium non arbitrabamur competitorem fore, qui et negavit et iuravit morbum et illud suum regnum iudiciale opposuit*). He presided in B.C. 81 at the trial of the action in which Cicero pleaded for P. Quinctius, and is constantly addressed by Cicero. He assisted Cicero in his defence of Caecina (27. § 77) in B.C. 69; he presided in B.C. 66 as praetor in a trial for *ambitus* (Cic. *Clu.* 53. § 147), and he is mentioned in Val. Max. viii. 2. § 2 as judge in a case in which a book-obligation was sought to be enforced, and the defence was that it was granted only *mortis causa*. (See other grounds of defence in Savigny *Verm. Schr.* i. p. 254.) But these, no doubt, are only accidental instances of the ordinary course of Aquilius' life. To the world he was almost more distinguished by his fine house on the Viminal than by his profession (Plin. xvii. § 2), but his own passion was for law. Cicero describes him as devoted to the interests of the public, skilful in advice, and always ready to give it, of a nature so clear and straightforward that the maxims of just law were its natural expression, so wise in law that he seemed to grow the nobler from its study (Cic. *Caecin.* 27. § 78). He cared for and studied the law itself and not the advocate's rôle. When a case turned on a question of fact, he declined it and replied to the consulter; '*Nihil hoc ad ius; ad Ciceronem*'. It is 'not a point of law: Cicero is your man' (Cic. *Top.* 12. § 51). He had a principal share in training Servius Sulpicius (Cic. *Brut.* 42. § 154), and lived at the time, as Pomponius states (D. i. 2. 1 2. § 43), at Cercina (see under Sulpicius).

Three special legal improvements are attributed to him. One is the *Stipulatio Aquiliana*, i.e. a comprehensive form of stipulation embracing all liabilities, to be followed by a general release (D. xlvi. 4. 1 18). Another is a form of words for institution of grandchildren as heirs, who should be born after the death of testator and whose own father should have died before the testator, leaving them in fact *sui heredes*. The form is given in an extract from Cervidius

<sup>1</sup> The Flor. ms. spells the word with one l. Inscriptions spell it both with one and with two.

Scaevola (D. xxviii. 2. 1 29), which is full of difficulty. A third was the explicit recognition of fraud as a ground for action, and was doubtless introduced by Aquilius when praetor. *Inde euerriculum malitiarum omnium, iudicium de dolo malo, quod C. Aquillius familiaris noster protulit; quem dolum idem Aquillius tum teneri putat, cum aliud sit simulatum, aliud actum* (Cic. N. D. iii. 30. § 74; cf. Off. iii. 14, 15. §§ 60, 61 and below p. 131). The action took the shape of claiming *restitutio in integrum* (D. iv. 3).

In the Digest Aquilius (either as Gallus or Gallus Aquilius) is cited in Javolen's editions of Labeo xxxii. 1 29. § 1; xl. 7. 1 39; also by African xxviii. 6. 1 33. § 1; by Scaevola l. c.; by Ulpian viii. 5. 1 6. § 2; xix. 1. 1 17. § 6 (at second hand from Mela); xxx. 1 30. § 7; xliii. 24. 1 7. § 4; by Paul xxx. 1. 1 27; xxxiv. 2. 1 32. § 1; l. 16. 1 77; and by Licinius Rufinus xxviii. 5. 1 75 (74). In D. l. 16. 1 96 Celsus says that M. Tullius, in a case in which he was arbitrator, was the first to lay down that the seashore (*litus*) extended inwards as far as the largest wave came. He probably learnt this from Aquilius, who was, as Cicero tells us (*Top.* 7. § 32), in the habit of defining the seashore *qua fluctus eluderet* (*alluderet?* see Mayor on Cic. N. D. ii. § 100). Mommsen suggests that in the Digest for *idque Marcum Tullium aiunt constituisse* we ought to have *idque M. Tullius Gallum Aquilium ait constituisse*.

The *lex Aquilia*, D. ix. 2, has nothing to do with C. Aquilius Gallus. It was of much earlier date. See below, p. 99.

SERVIUS SULPICIUS, whose full name was Servius Sulpicius Q. F. Lemoniā Rufus (i. e. of the Lemonian tribe), was the greatest lawyer of the Republic, at least in the estimation of the Digest writers. Cicero tells us he was the same, or very nearly the same, age as himself, and therefore was born about 106 B. C., son of a man of equestrian rank, the grandfather being a person of no note (Cic. Brut. § 150; Mur. § 16). He passed through the same early training as Cicero, and went with him to Rhodes B. C. 78, studied oratory and dialectic, and practised as an advocate in the Courts with great distinction. Pomponius (D. i. 2. 1 2. § 43) tells an anecdote of what determined him to study law. He was engaged in conducting a friend's case and consulted Q. Mucius Scaevola on a point of law. Not fully comprehending Scaevola's answer, he asked him again, and again failed to understand. Whereupon Scaevola reproached him with being a patrician and noble and advocate and yet ignorant of the law with



which he was concerned. Stung with the reproach Servius attended the best lawyers of the day, and obtained a first training from Lucilius Balbus and more complete instruction from Aquilius Gallus (*institutus a Balbo Lucilio, instructus autem maxime a Gallo Aquilio*). He went to Aquilius to Cercina for this purpose and there he wrote several works. Cercina, an island near the coast of Africa, a little north of the Syrtis minor, was a place where trading vessels often congregated (Liv. xxxiii. 48. § 3; *Bell. Afr.* 34). Marius was there for a time (Plut. *Mar.* 40), and Hannibal for a night (Liv. *l. c.*). Sempronius Gracchus, accused of adultery with Julia, daughter of Augustus, was in exile there for 14 years, *inter extorres et liberalium artium nescios* (Tac. *Ann.* i. 53; iv. 13). The place seems strangely chosen for an active jurisconsult like Aquilius. We have no confirmation of any part of the story from other sources.

Sulpicius was quaestor with Murena, and had the troublesome district of Ostia assigned to him (Cic. *Mur.* 8. § 18). He was praetor, and presided over the trials for *peculatus* (ib. §§ 35, 42). In 63 B.C. he was an unsuccessful candidate for the consulship, and with Cato accused Murena, one of the successful candidates, of *ambitus*. Cicero defended Murena in the brilliant and witty speech which is preserved. He speaks of and to Sulpicius with the respect due to their strong friendship and Sulpicius' great merits, but points out that a popular election is much more readily carried by military glory than by a jurisconsult's sober and technical profession, and rallies the lawyers on their unmeaning forms. In B.C. 51 Sulpicius was consul with M. Marcellus. In the civil war he took no decided side (see Cicero's letters to him *Fam.* iv. 1, 2; *Att.* x. 14; 15, &c.), but afterwards inclined to Caesar, and was made by him governor of Achaia B.C. 45 (Cic. *Fam.* vi. 6. § 10). Whilst in this office he wrote two letters to Cicero, which are preserved in the collection of Cicero's letters (*Fam.* iv. 5; 12), one consoling Cicero in tender and beautiful language for the loss of his daughter, the other relating with marks of genuine feeling the murder of M. Marcellus. In the following year (U.C. 710 B.C. 44) Caesar was assassinated on the Ides (15th) of March, and Sulpicius proposed on the 17th that no public notice should be put up of any decree or grant of Caesar since the Ides of March. Antony and others agreed to it (Cic. *Phil.* i. 1. § 3). When the senate determined to send commissioners to Antony to Mutina directing him to leave D. Brutus undisturbed in Gaul and himself to

take Macedonia, &c. the commissioners were Serv. Sulpicius, L. Philippus, and L. Piso. They left Rome early in January 43 B.C., Sulpicius being in bad health. When they got near the camp of Antony Sulpicius died. Cicero's ixth Philippic is devoted to praising his patriotic conduct and proposing a public funeral and the erection of a statue in his honour on the Rostra. This statue still remained in the time of Pomponius.

Cicero says that Sulpicius might possibly have been in the first rank of orators, if he had not preferred to be far the first in the inferior profession of lawyer. In that he surpassed Scaevola and others, because he alone was a scientific lawyer: he had studied dialectic, and thence had learnt to distribute the whole into parts, to discover the latent characteristic, to explain the obscure, to distinguish the ambiguous, to detect fallacies and to draw right inferences. He had studied literature and had an elegant style; and, though a pupil of Balbus and Gallus, he surpassed them both, being more careful and profound than the quick and ready Gallus, more active and efficient in business than the slow and considerate Balbus (Cic. *Brut.* §§ 151—154). Quintilian says he was in the habit, by way of exercise, of turning Latin poetry into prose (x. 5. § 4); and that he gained marked fame by his speeches, three of which were extant in Quintilian's time, besides some notes of speeches which were so carefully made as to give him the impression of being intended for a permanent record (vii. 1. § 116; 7. § 30). He is named by Plin. *Ep.* v. 3 in a list of grave Romans who had written light verses. He is said to have written 180 law books, of which many were extant in Pomponius' time. Of his works, one fragment from a book *de dotibus* is given by Gellius (iv. 4), and a reference to the same book in *ib.* 3; D. xii. 4. 28; mention is made of a book *de sacris detestandis* (Gell. vii. (vi.) 12); of two books on the Edict addressed to Brutus (D. i. 2. 1 2. § 44); and of some criticisms on Q. Mucius (Gell. iv. 1. § 20). Several explanations of words by him are given by Varro, Festus, and others, and are collected by Huschke. He had many pupils. Namusa is said to have digested their writings in 140 books (D. *ib.*). There are no extracts from him in the Digest, but his opinion is frequently (about 80 times) quoted, often as given by one of his scholars, e.g. D. iii. 5. 1 20 (21). pr.; iv. 8. 1 40; v. 1. 1 80; xvii. 2. 1 65. § 8; xxiii. 3. 1 79; xxxiii. 4. 1 6; xxxiv. 7. 1 12; xxxiv. 2. 1 39; xxxv. 1. 1 40. § 3; xxxix. 3. 1 1. § 6.

There is no evidence for referring to Serv. Sulpicius the in-

troductio of the *Actio Serviana* for recovery of things mortgaged by a farmer, Just. iv. 6. § 7 (Puchta *Cursus* § 251 note *f*).

CORNELIUS MAXIMUS was apparently, though the passage is corrupt, the master of Trebatius (D. i. 2. 1 2. § 45), and in that capacity is alluded to by Cicero in one of his playful letters to Trebatius (*Fam.* vii. 8). Trebatius used frequently to adduce his opinion as an authority (ib. 17). Whether he is also meant by Cn. Cornelius in ib. 9 is doubtful. He is apparently mentioned by the side of Tubero in Gai. i. 136; and his opinion is quoted by Alfenus against that of Serv. Sulpicius in D. xxxiii. 7. 1 16. § 1.

ALFENUS UARUS, one of Servius Sulpicius' scholars, and coupled by Pomponius (D. i. 2. 1 2. § 44) with Ofilius, as the two scholars that had most authority. He attained the dignity of consul, and wrote, according to the Florentine Index, *Digesta* in 40 books, of which however the 7th is the highest-numbered book from which an extract is made in the Digest, but the 39th is referred to in D. iii. 5. 1 20 (21). Paul made an epitome of it, extracts from which are also found in the Digest. Those from the *Digesta* itself are 29 and fill 5½ of Hommel's pages; those from Paul's *Epitome* are 25 and fill 3½ pages. Gellius vii. (vi.) 5. § 2 quotes from the 34th book of the *Digest*, 2nd of the *Collectanea*, a double reference, which some connect with Namusa's collection of the writings of Servius' scholars. Alfenus was *consul suffectus* with Cocceius in B.C. 39 U.C. 715; and, if it was his son that was the consul of A.D. 2, we learn that the father's praenomen was Publius (Henzen on Fast. Biond. *Corp. I. L.* i. p. 467, who refers to Dion's *Index* under lib. lv. for the son). The agnomen *Catus* which is given him by Rudorff and others is simply a conjecture of Huschke's for the mysterious 'Gaius', which follows Alfen's name in Pomponius (*Z. G. R.* xv. 187). If it had really been his agnomen, would Horace (see below) have substituted *uafer*?

There is a romantic story told of Alfenus by Porphyrio the Commentator on Horace, and alluded to apparently by Horace himself in the lines where, illustrating the Stoical view, that the wise man knows all arts implicitly, he says *ut Alfenus uafer omni obiecto instrumento artis clausaque taberna sutor erat* (*Sat.* i. 3. 130; some mss. have *tonsor*). Porphyrio says Varus was a cobbler of Cremona, who gave up his business, went to Rome and profited so much by the instruction of Sulpicius, that he gained the consulship and re-



ceived a public funeral. *Uafer* is an epithet which naturally applies to a lawyer.

The lawyer is by some identified with the Alfenus to whom Catullus addresses his 30th epigram, and possibly with the Varus of epigrams 10 and 22. This latter however is much more likely Quintilius Varus the poet. Further he is on the authority of Servius and the scholiasts on Vergil identified with the Varus who with Vergil attended the lectures of Siron, the Epicurean philosopher (Schol. Veron. to Verg. *Ecl.* v. 9; Ribbeck *Praef. ad Verg. ed. min.* p. x, but this seems by no means certain: Quintilian speaks of a L. Varus as an Epicurean and friend of Caesar), and to whom Vergil addressed his 6th *Eclogue* and also some verses in *Ecl.* ix. 27 sqq. The Bernese scholiast (on *Ecl.* viii. 6) states that Varus was one of Augustus' commissioners for settling lands in the neighbourhood of Cremona on veteran soldiers B.C. 40, and that in revenge for a Mantuan (Octavius Musa) having taken some of his cattle in pledge and starved them to death, Varus distributed to the veterans some of the Mantuan lands. Others make Musa to have been the spoiler, and Varus to have succeeded Pollio as legate and to have been sent with instructions to restore some of the land, instructions which he very imperfectly carried out (see Teuffel-Schwabe § 208. 3; Forbiger *ad Verg.* ll. cc.; Ribbeck *Praef. cit.* pp. xviii—xx).

Of the extracts in the Digest the following are most noticeable: v. 1. l 76, where he refers to the opinion of philosophers that the particles of the human body are continually being replaced by others; ix. 2. l 52; xxxv. 1. l 27; xxxix. 2. l 43; l. 16. l 203; and others from Paul's abstract, xix. 2. l 30; l 31; xxxii. l 60; xxxix. 3. l 24; xli. 1. l 38. They contain some interesting cases well expressed. He is cited 17 times, usually as Alfenus, but once (D. xxxiii. 4. l 6) as Alfenus Varus, and thrice as Varus, viz. vi. 1. l 5. § 3; xl. 12. l 10; l. 16. l 39. § 6.

OFILIUS<sup>1</sup>, one of Servius' pupils, who with Alfenus had the most weight as a lawyer. Aulus Ofilius was of equestrian rank and did not rise above it. Cicero twice at least mentions him in his letters, once B.C. 45 to Atticus (xiii. 37), once B.C. 44 to Trebatius (*Fam.* vii. 21; and cf. xvi. 24. § 1), in both cases respecting some law business. Pomponius says he was more learned than either Cascel-

<sup>1</sup> In Cicero the name is spelt Ofilius. In inscriptions it appears to be most frequently Ofillius, frequently Ofilius, rarely Ofillius. (*Indices to Corp. I. L.* iii. ix. x.)

lius or Trebatius: that Capito 'followed' him, and that he was one of those whose instruction Labeo attended. 'He was very intimate with Julius Caesar and wrote many books on civil law, which laid a basis in all parts of the subject'. Huschke (*Z. G. R.* xv. 189) aptly remarks that Caesar amongst other plans formed the idea of making a digest of the law, *Ius civile ad certum modum redigere atque ex immensa diffusaque legum copia optima quaeque et necessaria in paucissimos conferre libros* (Suet. *Iul.* 44). It would seem probable that Ofilius was his agent for this purpose, as Varro was for forming a library. This 'Tribonian of the Republic' (Huschke, p. 202) left, whether as part of Caesar's scheme or not, works which appear to have dealt with all the great branches of law. The words of Pomponius are probably corrupt; *nam de legibus uicensimae primus conscribit: de iurisdictione idem edictum praetoris primus diligenter composuit*, D. i. 2. 1 2. § 44. Sanio has suggested *uiginti libros* for *uicensimae*, and Huschke and Rudorff support this. After *de iurisdictione* Huschke supposes a number (e.g. x. *libros*) to have fallen out, but it is possible to take the sentence as it stands, *de iur.* denoting the branch of the subject on which Ofilius worked in drawing up the Edict. Then in D. xxxii. 1 55. §§ 1, 4, 7 *Ofilius libro quinto iuris partiti* is quoted; in xxxiii. 9. 1 5. §§ 5, 8 *Ofilius libro sexto decimo actionum*. Whether *Ofilius ad Atticum ait* (D. l. 16. 1 234) refers to a separate work, addressed possibly to T. Pomponius Atticus, we do not know. But we shall not be far wrong, if we infer from these notices that Ofilius wrote on the statute law (*de legibus*), on the relations of some parts of the civil law (*ius partitum*), on the *ius honorarium* (*edictum Praet.*), and on *Actiones* (cf. D. i. 2. 1 2. §§ 5, 12).

What Ofilius did with the Edict is difficult to say. Pomponius' words are that 'he was the first to draw up the Edict with care'. This would naturally apply to a good lawyer in the office of praetor. But Ofilius did not leave the equestrian rank and consequently never was praetor. Pomponius probably meant that Ofilius was the first to deal with the traditional edict in a thorough and systematic manner: he rearranged and revised it for the benefit of the praetor at the time or a future one. Such assistance by experts must often have been given. If he did it at Caesar's instigation, its general adoption would be pretty certain; (see below under JULIAN). But Pomponius is not a writer who inspires confidence in the precise historical correctness of his expressions.

There are no extracts from Ofilius' works in the Digest, but Ofilius is cited often (about 50 times), e.g. D. II. 1. 1 11. § 2; 7. 1 1. § 2; 9. 1 1; IV. 1. 1 16. § 1; 8. 1 21. § 1; XIV. 2. 1 2. § 3; XXI. 1. 1 17. pr.; XXIV. 3. 1 18. § 1; XXXII. 1 29. § 1; XXXIII. 4. 1 6. § 1; XXXIX. 3. 1 1. § 5; § 21; 1 2. § 10; 1 3; XLIII. 20. 1 1. § 17; 21. 1 3. § 10; XLVII. 2. 1 21. pr. &c.; Gai. III. 140.

Besides Alfenus Varus and A. Ofilius, Pomponius (§ 44) mentions as scholars of Servius and writers, Gaius, Titus Caesius, Aufidius Tucca, Aufidius Namusa, Flavius Priscus, Gaius Ateius, Pacuvius Labeo, Antistius, Labeonis Antistii pater, Cinna, Publicius Gellius.

Mommsen proposes either to strike out Gaius or to transpose the word so as to give Cinna a praenomen. Asher (*Z. R. G.* v. 91) suggests that the commentator Gaius was meant, Justinian's compilers thinking him to be an ancient authority like Q. Mucius. For Huschke's conjecture, see above under ALFENUS. Schulin (*ad Pand. tit. de origine iuris*, 1876) thinks that this law (D. I. 2. 1 2) was not one continuous extract, but consisted originally of several extracts, which have been run together by the copyists; and that *Gaius* in §§ 37, 42 and 44 is the remains of the inscription of extracts from Gaius *ad XII. tab.*

Of T. Caesius, Aufidius Tucca (see however below), and Fl. Priscus nothing more is known. For Pacuvius Labeo see under his son's name, p. cxxiv.

AUFIDIUS NAMUSA is said by Pomponius to have arranged all the writings of these scholars of Servius into 140 books (*quorum omnes qui fuerunt libri digesti sunt ab Aufidio Namusa, &c.*). Namusa is cited by Javolen *ex posterioribus Labeonis*, D. xxxv. 1. 1 40. § 3; and Labeo probably refers to him in D. xxxiii. 5. 1 20, *Apud Aufidium libro primo rescriptum est*; and Ulpian in D. xvii. 2. 1 52. § 18, unless Tucca be meant. Namusa is cited by Ulpian D. xiii. 6. 1 5. § 7; and by Paul D. xxxix. 3. 1 2. § 6. Possibly this work of Namusa's is the source of the references to *Servii auditores* (D. xxxiii. 4. 1 6. § 1; 7. 1 12. pr.; § 6; xxxix. 3. 1 1. § 6). A juridical fragment is quoted from P. Aufidius by Priscian, viii. 4. § 18 (Huschke *Iur. Antei.* p. 99<sup>4</sup>).

C. ATEIUS is probably the writer meant by Labeo, D. xxiii. 3. 1 79. § 1 *Ateius scribit Servium respondisse*; xxxii. 1 30. § 6; xxxiv.



2. 1 39. § 2; by Paul xxxix. 3. 1 2. § 4; and xxxix. 3. 1 14. pr.; where Flor. has *Antaeus*, the inferior mss. *Ateius*.

It has been suggested that he was father of C. Ateius Capito, the rival of Labeo, and the same as the C. Ateius Capito whom Cicero speaks of as a close friend of his own and a warm supporter of Julius Caesar (Cic. *Fam.* xiii. 29, B.C. 46). This C. Ateius was tribune with Aquilius Gallus (the coincidence of names is curious) in B.C. 55, when Pompey and Crassus were consuls. He violently opposed the assignment of provinces to the consuls, and especially Crassus' departure for Syria (Plut. *Crass.* 16; Dio. xxxix. 32 sqq.), and was afterwards 'noted' by Appian for having made a false report of the conspiracy (Cic. *Div.* i. 16). If he was father of the famous Capito, he obtained the rank of praetor, and was son of one of Sulla's centurions (Tac. *An.* iii. 75).

There was a grammarian Ateius also. He may have been a freedman of the Capitos. See Suet. *Gr.* 10; Teuffel-Schwabe, § 211. 1.

CINNA is cited by Ulpian in D. xxiii. 2. 1 6; xxxv. 1. 1 40. § 1.

PUBLICIUS GELLIUS. A jurist called Publicius is cited by Marcellus, D. xxxi. 1 50. § 2; by Modestinus xxxv. 1. 1 51. § 1; by Ulpian xxxviii. 17. 1 2. § 8 (*Africanus et Publicius temptant dicere*), but neither the authors by whom he is cited, nor the company in which his name appears, seem to suit a pupil of Servius.

There is nothing to connect this man with the *Actio Publiciana* (D. vi. 2; *Inst.* iv. 6. § 4).

TREBATIUS, whose full name was C. *Trebatius Testa*, was of a family settled at Velia in Lucania (Cic. *Top.* 1. § 5; *Fam.* vii. 20). He was of the equestrian rank (Porph. ad Hor. *Sat.* ii. 1. 1); and was a pupil in civil law of Cornelius Maximus. Cicero was much attached to him and desirous of promoting his interests. In B.C. 54 he had intended taking him with him on some journey (cf. *Fam.* vii. 17. § 2), but his plans were altered, and, when discussing with Balbus whether he should send Trebatius to Caesar, he received a letter from Caesar, suggesting Cicero's sending him some one whose career he might assist. Cicero sent him Trebatius, saying there was no better man or more upright and modest character: besides which he was a leader in civil law, from his remarkable historical and legal knowledge (*Accedit etiam quod familiam ducit in iure civili singu-*

*auspices*

*lari*<sup>1</sup> *memoria, summa scientia* Cic. *Fam.* vii. 5). It was in this year Cicero wrote his books *de republica*. Possibly Trebatius may have been made useful in connexion with them. Caesar offered him the position of a tribune without the military work (ib. 8. § 1) but he refused; apparently did not go to Britain with Caesar (ib. 17. § 3); and, though kindly and considerately treated, did not much relish life in the army (ib. 18. § 1). Cicero's letters to him at this time are written as to a congenial spirit and are very pleasant: he rallies him in a lively tone with plenty of puns and chaff. 'You that have learnt to draw up securities for others, keep yourself secure from those British charioteers (ib. 6), unless you can catch a chariot and drive home in it (ib. 7). I thought you had learnt wisdom from Cornelius: it tells greatly against him that you are so unwise as to decline Caesar's offers (ib. 8). So Caesar thinks you quite a lawyer. You must be glad to have found a place where some one thinks you have wits (*aliquid sapere*). If you had gone to Britain, I will answer for it there would have been no better lawyer (*peritior*) there. Mind you use a stove to keep off the cold: I can quote Mucius and Manilius' opinion on its propriety (ib. 10). I wish you were here to meet me in a contest of wit or argument: it would be a deal better than you will get from our enemies or even from our friends the Aedui (ib. § 4). You write that Caesar consults you: I would rather he should consult your interests. If there is no chance of that, come back to us. You will get more from a single talk with me than from all put together at Samarobriua. If you stay much longer, our playwrights will have you on the stage in the character of a British lawyer (ib. 11). Pansa tells me you have turned Epicurean! What havoc that will make with your law! How can you draw any more formulae with *ut inter bonos bene agier oportet*? For no good man is selfish. How can you say what should be done 'for partition of common property'? If every man looks after himself only, what can there be in common? And then what becomes of your studies of religious oaths? How can you swear by the stone Jove (*Iovem lapidem iurare*<sup>2</sup>), if you

<sup>1</sup> So Wesenberg and Baiter. The Cod. Med. has *singularis*, which Zimmern i. p. 298 with others translates, 'he has also what in civil law is the chief point, a singular memory and great knowledge'. Compare the use of *fam. duc.* in Cic. *Fin.* iv. 16. § 45. But what the context wants is the statement that Trebatius was a good lawyer, not a comparative estimation of the qualities which make a lawyer. Of course *fam. duc.* should not be pressed, as some have pressed it, to mean that Trebatius was the head of a special school of law.

<sup>2</sup> An obscure phrase explained by Polyb. iii. 25; Paul. Fest. p. 115 of a

'know that there is no Jove to be angry with any one? (ib. 12). 'I am afraid you have little scope for your profession there: they 'don't join issue (*manum conserere*), but cross swords. However you 'are not a very forward fighter, and so you need not fear that any 'one in an interdict will use against you, the plea 'provided you have 'not been first to use armed force'. But I do advise you to keep 'clear of the Treviri' (Caesar marched against them in B.C. 53): 'I am 'told they are very *Tresviri Capitales* (cf. D. I. 2. 1 2. § 30): I wish 'they had been only the *Tresviri* of the mint (ib. 13). Balbus 'assured me you would be quite a rich man. Did he mean, what we 'Romans mean by riches, a good supply of coin in your pocket? or 'what the Stoics call riches, the sky above you and the earth below? 'I am told you are so haughty, as to give no answers to those who 'question you. I can at least congratulate you on there being no better 'jurisconsult at Samarobriua (ib. 16). You are very economical in 'using palimpsests for your letters: I hope you have not destroyed 'mine for the purpose: I don't blame you if it is only your legal 'drafts' (ib. 18). Subsequently Trebatius is found on Caesar's side in the civil war, and writing to Cicero to say that Caesar wished Cicero either to join him or at least to go to Greece out of the way (Plut. *Cic.* 37). He was at Caesar's side on one occasion, when Caesar incurred great odium by not rising to receive an address from the senate. Trebatius hinted to him to rise, but Caesar only replied by an unfriendly look (Suet. *Iul.* 78). After Caesar's death, B.C. 44, Cicero while voyaging to Greece (as he intended, though he afterwards altered his mind) called at Velia, saw Trebatius' home, paternal estate and friends, and was reminded thereby that Trebatius once, having referred to Aristotle's *Topica* at Cicero's Tusculan Villa, had asked Cicero to translate them for him. Accordingly on his voyage from Velia to Vibo, Cicero wrote from memory an account of the *Topica*, illustrated it with legal examples, and addressed it to Trebatius (Cic. *Top.* 1; *Fam.* VII. 19, 20). From Tusculum, in the summer of the same year, he sends C. Silius to Trebatius to consult him professionally (ib. 21). Another letter of uncertain date relates how Cicero over his wine with Trebatius had told him that it was a disputed point, whether an heir could sue for theft committed before he became heir. Trebatius said no one ever thought that. Cicero drank freely and went home late, but found the passage, wrote it out,

prayer to Jove to cast them away, if they break faith, as they throw away a stone. But?



and sent it to Trebatius, *ut scires, id quod tu neminem sensisse dicebas, Sex. Aelium, M'. Manilium, M. Brutum sensisse: ego tamen Scaeuolae et Testae assentior* (ib. 22). Horace addresses to Trebatius the 1st Satire of his second book (cir. 30 B.C.), which is framed as a dialogue between them. Trebatius recommends Horace to sing (Octavius) Caesar's praises. Horace says he is not fit for so high a theme, and prefers satirical writings. Trebatius reminds him of the penalties for 'bad poems' against persons (*mala carmina* i.e. libels), to which Horace retorts by a pun, 'What if the poems be *good*, and Caesar praise them?'

Of his legal career we are told but little. He had the early training of Labeo (*institutus est a Trebatio* D. I. 2. 1 2. § 47), who however attended other teachers as well. Pomponius says he was less eloquent but a better lawyer than Cascellius, and that Ofilius was more learned than either. On the important question whether codicils should be sanctioned, Trebatius had the decisive voice. L. Lentulus died in Africa and left a codicil confirmed by his will imposing a trust on Augustus amongst others. Augustus performed the trust, whereupon others did the same, and Lentulus' daughter paid some legacies which were not strictly due. Augustus summoned the lawyers to advise him whether codicils should be allowed. Trebatius advised in their favour, as a convenient form for persons on a journey. His authority was at that time the highest; and, Labeo afterwards leaving a codicil, their validity was fully established (Just. II. 25).

He wrote books, several of which were extant but not much used in Pomponius' time (D. I. 2. 1 2. § 45). Some were *de iure civili*, nine books were *de religionibus*. This last work is quoted by Gell. VII. (VI.) 12, and Macrob. *Sat.* I. 16. § 28; III. 3. §§ 2, 5 (where a tenth book is quoted); 7. § 8. It is also quoted by the scholiasts on Vergil and by Arnobius; see the passages in Huschke *Iurispr. Anteiust.* On one point, in which, according to Gellius IV. 2, he gave a contrary opinion to Labeo, the Digest has followed Trebatius (XXI. 1. 1 14. § 3).

He is often (almost 80 times) quoted in the Digest, chiefly by Javolen and (probably at second hand through Javolen's editions of Labeo) by Ulpian and Paul (D. XXXII. 1 29. pr.; 1 30. § 5; 1 100. §§ 2—4) and others. Cf. IV. 3. 1 8. §§ 3, 4; 8. 1 21. § 1; XI. 7. 1 14. § 11; XVI. 3. 1 1. § 41; XVIII. 6. 1 1. § 2; XXI. 1. 1 6. § 1; 1 12. § 4; 1 14. § 3; XXX. 1 5. § 1; 1 30. § 5; XXXIX. 3. 1 1. § 3; XL. 7.

1 3. § 11; xli. 1. 1 16; 1 19; 2. 1 3. § 5; xliii. 23. 1 2; 24. 1 1. § 7; 1 22. § 3.

AULUS CASCELLIUS was a contemporary of Trebatius. The words of Pomponius relating to his legal instructor are evidently corrupt. He could hardly have been a pupil of Q. Mucius (as that would imply his being born before 100 B.C.), but may well have been a pupil of one of those who learnt from Mucius. Pomponius seems to name Volusius. Pliny names Volcatius, a noble, as his master (*H. N.* viii. 144). He attained the rank of quaestor, and was offered the consulship by Augustus, but declined it (*D. i. 2. 1 2. § 45*). The cause was probably the same as Labeo's (see below). He was a firm republican and free in expressing his thoughts.

He positively declined to draw a formula (pleadings in an action) on behalf of any of the grantees of land seized by the triumvirs (Octavius, Antonius and Lepidus), and, when fully expressing his thoughts on the empire and warned by his friends of the danger of doing so, answered that what men in general found evils he found a protection—old age and childlessness (*Val. Max.* vi. 2. § 12). He is named by Horace as a living type of a learned jurisconsult. This is in the *Ars Poetica* 37, the date of which is uncertain, but according to the latest opinions between 24 and 20 B.C. (*Nettleship Journ. of Phil.* xii. 44) or somewhat later (*Mommsen Hermes* xv. 114). Ammianus refers to him with Trebatius and Alfenus as types of old-world lawyers (*xxx. 4. § 12*). He selected a grandson of Q. Mucius for his heir (*D. i. 2. 1 2. § 45*).

He was more eloquent than Trebatius but not so good a lawyer. His wit is celebrated. When Vatinius (Cicero's old enemy) was pelted with stones by the people on account of the poor games he had given, he got a law passed that no one should throw into the arena anything but *poma*. A man came to Cascellius to consult him on some matter of his own, and asked whether *nuces pineae* (fir cones?) came under the head of *poma* (cf. *D. L.* 16. 1 205). Cascellius at once had a hit at Vatinius: 'Yes, if you want to pelt Vatinius with them', was the reply (*Macrob. Sat.* ii. 6). Another man came to consult him about a division of property. 'I want to divide a ship'. Cascellius took 'divide' literally, and answered, 'You'll ruin it, if you do' (*Quint.* vi. 3. § 87; Macrobius puts it *navem si diuidis, nec tu nec socius habebitis*). Only one book of his was

<sup>1</sup> Dirksen (*Der Rechtsgelehrte A. Cascellius*) takes the answer as a play on *navis*. This is a mistake. See the initial words of the chapter of Macrobius.

extant in the time of Pomponius. It was a book *bene dictorum*, which is ambiguous, and may mean a book of good sayings, i.e. witticisms, or of well-expressed opinions.

In Gai. iv. 166 we read of a *Cascellianum* or *secutorium iudicium*, employed to obtain possession of the thing in dispute, after an action on a wager (*sponsio*) has been decided in favour of the suitor not in possession. Whether this was named after Aulus Cascellius, we do not know. It would, one would think, be introduced by a praetor, and Cascellius was not praetor, so far as Pomponius knew.

He is cited with others of his time in the Digest, chiefly by Labeo (as edited by Javolen) xxviii. 6. l 39. § 2; xxxii. l 29. pr.; l 100. pr.; xxxiii. 4. l 6. § 1; 6. l 7; 7. l 4; l 26. § 1; 10. l 10; xxxiv. 2. l 39. § 1; xxxv. 1. l 40. § 1; once by Celsus l. 16. l 158; twice by Ulpian xxxix. 3. l 1. § 17; xliii. 24. l 1. § 7, both of which citations were very likely taken from Labeo.

In Cic. *Balb.* 20 we are told that Q. Mucius, the augur, when consulted on a point of the law of *praedictores* (i.e. purchasers of lands forfeited to the state from failure of the parties who had taken contracts, cf. Gai. ii. 61), used to refer the client to Furius or Cascellius, who were themselves *praedictores* and familiar with the matter. Mommsen suggests that this Cascellius was the lawyer's father (*Hermes* xv. p. 114).

TUBERO, whose full name was Q. Aelius Tubero (Cic. *Lig.* 1; Gell. xiv. 2. § 20), was a patrician who studied under Ofilius, and was first an advocate and afterwards became a lawyer. His father, L. Aelius Tubero, was an intimate friend of Cicero; they had been *domi una eruditi, militiae contubernales, post affines, in omni denique vita familiares* (Cic. *Lig.* 7. § 21). He was legate to Q. Cicero, when the latter was governor of Asia B.C. 61 (Cic. *ad Q. Fr.* i. 1. § 10). When the civil war broke out between Caesar and Pompey, L. Tubero was sent by the senate to take the government of Africa. The son accompanied him, but they were not allowed to land—as Tubero said, by Ligarius, who as legate of Considius, had been left there in charge of the government, or, as Cicero said, by the praetor Varus, who had succeeded Considius. On this repulse they went to Macedonia to Pompey's camp (Cic. *Lig.* 7—9) and the son was in Pompey's ranks at the battle of Pharsalus (ib. 3). In B.C. 46 he prosecuted C. Ligarius, as an opponent of Caesar, for not allowing him to land or even to take water. His speech was quoted by



Quintilian (xi. 80) and extant in Pomponius' time. Cicero defended Ligarius in a speech now extant, and Caesar, who heard the case himself, acquitted Ligarius, being, according to Plutarch (*Cic.* 39), much affected by Cicero's pathetic and flattering address. Tubero was so much chagrined at his failure, that he was partly thereby induced to give up advocacy (D. i. 2. l 2. § 46). He married a daughter of Serv. Sulpicius, and his own daughter was the mother of the lawyer and statesman, C. Cassius Longinus (ib. § 51). He is said to have been considered *doctissimus iuris publici et privati*. He wrote several books on both subjects, but his antique style of writing (cf. Gell. vi. 9. § 11) made the books not popular. Gellius mentions a work of his *de officio iudicis* (xiv. 2. § 20), and says (ib. 7. § 13) Ateius Capito quoted an opinion of Tubero's that a decree of the senate was always made by an actual division (*per discessionem*), and Capito agreed that this was so. The same on another point (ib. § 8).

He is cited in the Digest by Labeo D. xviii. 1. l 77; xxxii. l 29. § 4; xxxiii. 6. l 7; 7. l 25; by Celsus either directly or as reported by Ulpian vii. 8. l 2; xv. 1. l 5. § 4; l 6; xxxii. l 43; xxxiii. 10. l 7. § 2 (*magnopere me Tuberonis et ratio et auctoritas mouet*); xlv. 1. l 72. pr.; and so probably vii. 8. l 2. § 1; and by Paul xxxiv. 2. l 32. § 1.

A history of Rome by Tubero is often cited, and as the father wrote history (*Cic. Q. Fr.* i. 1. § 10) it seems natural to refer the quotations to his work. See them collected in Peter's *Hist. Rom. Fr.* p. 199 *ed. min.* He is however called Q. Tubero in Liv. iv. 23; Suet. *Iul.* 83, and, hence presumably, the jurist is considered to be historian as well, perhaps however editing or using his father's notes (Teuffel-Schwabe, § 172. 8; 208. 1).

C. AELIUS GALLUS, from whom one passage of a line and a half appears in the Digest (L. 16. l 157), probably taken second hand from some one, wrote a work *de significatione uerborum quae ad ius civile pertinent* (Gell. xvi. 5. § 3), apparently in two books. Festus quotes it twenty times. The passages, with three others from Gellius, Servius and Priscian, are collected in Huschke's *Iurispr. Antei.* p. 94. Those most interesting relate to *reus* (see below p. 46), *nexum*, *possessio*, *religiosum*. His definitions are cited in the Digest xxii. 1. l 19. pr.; L. 16. l 77 (*Gallum*).

His name is not mentioned in the Florentine Index.

BLAESUS is quoted by Labeo : *Blaesus ait Trebatium respondisse* (D. xxxiii. 2. 1 31).

GRANIUS FLACCUS is quoted by Paul D. L. 16. 1 144 (*Granius Flaccus in libro de iure Papiriano scribit, &c.*). For the *ius Papirianum* see D. i. 2. 1 2. §§ 2, 36 (above p. xci). Granius Flaccus is also quoted by Censor. *de die natali* 3 (*Granius Flaccus in libro quem ad Caesarem de indigitamentis scriptum reliquit*); and by Macrob. *Sat.* i. 18. § 4 (*quod cum Uarr. et Granius Flaccus adfirmant*). Other quotations of Granius and Granius Licinianus are referred to the same by Huschke *Iur. Anteiust.* p. 107 ed. 4. But see Teuffel-Schwabe §§ 199. 7; 359. 4, 5.

JUNIUS GRACCHANUS wrote a work *de potestatibus*, the 7th book of which is quoted by Ulpian in his work *de officio quaestoris* (D. i. 13).

FENESTELLA is quoted in the same place and classed with Junius and Trebatius. He lived from about 52 B.C. to 19 p. Chr. and wrote on legal and other antiquities, perhaps in the course of his *Annales*. See fragments in Peter *Hist. Rom. Fragment.* p. 272 sqq.; Teuffel-Schwabe § 259. 2, 3.

UITELLIUS. Of this jurist we only know that Sabinus wrote some books *ad Uitellium* (D. xxxii. 1 45; xxxiii. 7. 1 12. § 27; 9. 1 3. pr.); Cassius some notes (xxxiii. 7. 1. c.); and Paul four books *ad Uitellium* (see under PAUL). Some have supposed him to be the grandfather of the emperor Vitellius, and therefore *procurator rerum Augusti* (Suet. *Vit.* 2).

## CHAPTER IX.

### LABEO AND THE TWO SCHOOLS OF JURISTS.

LABEO was the son of a lawyer. The father was a friend of Brutus, joined in the conspiracy against Julius Caesar, and after the battle of Philippi dug himself a grave in his tent, and with the help of a slave killed himself (App. *B. Cin.* iv. 135; Plut. *Brut.* 12, 51). Appian describes him as famous for wisdom (i.e. legal skill?). His name was apparently Pacuvius Antistius Labeo (D. i. 2. 1 2. § 44).

The still more famous son, whose full name *M. Antistius Labeo* is given us by Porphyrio (ad Hor. *Sat.* i. 3. 82), was born about 50—60 B.C., and died about 12—20 A.D. He attended the lectures or consultations of Alf. Varus, Cascellius, Ofilius, Tubero, and especially Trebatius, who trained him. *Omnes hos audiuit, institutus est autem a Trebatio* (Pompon. D. ib. § 47). But his education was general as well as special: Gellius (XIII. 10) mentions especially his study of grammar and dialectic and the older Latin literature. In politics, as might be expected, he was a stern republican, a stickler for old constitutional rights, and ever ready to shew his animosity to the imperial government. His great rival as a contemporary lawyer, C. Ateius Capito, described him as eminently skilled in the laws and customs of the Roman people and in the civil law, but fanatically opposed to the slightest concession to the imperial rule. *Sed agitabat hominem libertas quaedam nimia atque uecors, tamquam...diuo Augusto iam principe et rempublicam obtinente ratum tamen pensumque nihil haberet, nisi quod iustum sanctumque esse in Romanis antiquitatibus legisset.* Capito gave an instance: a woman brought a complaint against Labeo to the tribunes of the commons; they sent to summon him to appear and reply to the complaint. Labeo refused, saying that the tribunes might come and arrest him, but to summon him was not within their competence (Gell. XIII. 12). His opposition to Augustus was shewn on the occasion of the Emperor's filling up the number of the senate (B.C. 18). Augustus took an oath to select the best men and nominated thirty, each of whom were, after taking the same oath, to name five others, the lot deciding among each set of five who should be enrolled as senator. These thirty, so chosen by lot, were each to name five in the same way. After this process had continued for some days, Augustus interfered, and himself selected the remainder up to the number of 600 (Dio Cass. LIV. 13). Labeo was one who had to choose and he named Lepidus, the former triumvir, whose son had conspired against Augustus. Augustus declared Labeo had violated his oath, and threatened to punish him. Labeo replied that there could not be anything very bad in naming Lepidus, as Augustus allowed him still to remain pontifex. Augustus asked if there were none worthier to name. Labeo replied, 'each must judge for himself'. On another occasion when the senators talked of taking it in turns to guard Caesar, Labeo said he snored, and therefore was not fit to act as guard in an antechamber (ῥέγκω καὶ οὐ δύναμαι αὐτοῦ προκοιτῆσαι, Dio Cass. ib. 15; Suet. *Aug.* 54).



The emperor rewarded the more obsequious disposition of Ateius Capito by advancing him to the consulship out of his turn, on purpose that he might so far have precedence of Labeo. The latter he offered to make *consul suffectus*, but Labeo declined, gaining additional popular favour from the indignity which his incorruptible republicanism had caused him. (Tac. *An.* III. 75 *Illa aetas duo pacis decora simul tulit, sed Labeo incorrupta libertate et ob id fama celebratior, Capitonis obsequium dominantibus magis probabatur. Illi, quod praetura intra stetit, commendatio ex iniuria, huic, quod consulatum adeptus est, odium ex invidia oriebatur.*) Porphyrio (on Hor. l. c.) thought Horace referred to the great lawyer, when he used the expression *Labeone insanior*, but as Labeo would not be more than 20 years old when this Satire was written, it is more likely that some one else was intended.

The time saved from political office was given by Labeo to law. He divided the year into halves, and spent six months at Rome, giving answers in public on cases submitted to him, and also some more direct instruction to students: *Iuris civilis disciplinam principali studio exercuit, et consulentibus de iure publice responsitavit* (Gell. XIII. 10); *Romae sex mensibus cum studiosis erat* (Pomp. D. I. 2. 1 2. § 47). The other six months he spent in the country, occupied in writing law treatises. Pomponius gives the number of volumes written by him as 400, and says many of them were still in use. The Florentine Index names only two works, *Pithana* (Probabilities) in 8 books, and 10 *Posteriores libri*. The *Pithana* were abridged and commented on by Paulus, and probably only in this form known to Tribonian. There are 34 extracts in the Digest, the longest of which are D. XIV. 2. 1 10; XIX. 1. 1 53; 1 54; XLI. 1. 1 65. The *Posteriores* were published after his death. Gellius says that the 38th, 39th, and 40th were full of explanations and etymologies of Latin words. Ulpian quotes the 37th book (D. IV. 3. 1 9. § 3); and Paul the 38th (D. XLVIII. 13. 1 11. (9.) § 2). It was abridged by Javolenus and used by the compilers in two forms (see under JAVOLENUS). The one is rather an account of Labeo's opinions criticized by Javolen. From this there are 47 extracts (see e.g. D. XXIV. 3. 1 66; XXXV. 1. 1 40; XL. 7. 1 39). In the other Labeo as a rule speaks directly. From this there are 27 extracts, the longest of which are D. XXXII. 1 29 (perhaps really an extract from the former work); 1 30; XIX. 2. 1 60. Labeo wrote also on the law of the Pontifices, extracts from which work are found in Festus: and on the

xii. tables, from which work extracts are given by Gellius. One extract from some books on the Praetor's edict is also given by Gellius. (All these fragments are in Huschke.) The citations of Labeo in the Digest are very numerous (540), but the work or book is rarely named. Pernice supposes most of them to be taken from the work on the Edict (Labeo, i. p. 55). It is referred to in D. iv. 3. 1 9. § 4; L. 16. 1 19. Books of *Epistulae* are mentioned in xli. 3. 1 30. § 1.

If D. xxxiv. 2. 1 32 *Labeo testamento suo Neratiae uxori suae nominatim legavit uestem* &c. speaks of our Labeo, we have an extract from his will and learn the name of his wife. (But Labeo is a name occurring of others than the jurist, e.g. D. xxviii. 1. 1 27; xxxix. 5. 1 35. § 2.) That he left codicils is certain, and his practice in this respect removed all doubts as to the validity of such a quasi-testamentary disposition (*Inst.* ii. 25).

Labeo and Capito are stated by Pomponius to have for the first time created opposing parties or schools of lawyers. His words are *Hi duo primum ueluti diuersas sectas fecerunt; nam Ateius Capito in his quae ei tradita fuerant perseuerabat; Labeo ingenii qualitate et fiducia doctrinae, qui et ceteris operis sapientiae operam dederat, plurima innouare instituit. Et ita Ateio Capitoni Massurius Sabinus successit, Labeoni Nerua, qui adhuc eas dissensiones auxerunt... Massurius Sabinus primus publice respondit* (D. i. 2. 1 2. §§ 47, 48). He proceeds to mention Gaius Cassius Longinus as succeeding Sabinus, and Proculus as succeeding Nerva. At the same time as Nerva were Nerva *filius* and another Longinus. *Sed Proculi auctoritas maior fuit, nam etiam plurimum potuit; appellatique sunt partim Cassiani, partim Proculiani (Proculeiani F.), quae origo a Capitone et Labeone coeperat* (ib. § 52). The successors of Cassius were, in chronological order, Caelius Sabinus, Priscus Javolenus, Aburnius Valens and Tuscianus; also Salvius Julianus. The successors of Proculus were Pegasus, Celsus *pater*, Celsus *filius* and Priscus Neratius (§ 53). The succession is often taken to be succession in a general sense as heads of the school or party for the time, but a more precise meaning has been suggested and is certainly possible. Gellius speaks of there being in his time (?160—170 A.D.) many stations in Rome where lawyers regularly taught and advised on cases (*Quaesitum esse memini in plerisque Romae stationibus ius publice docentium aut respondentium, an* &c. xiii. 13). It is reasonable to suppose that there were two such stations in the earlier time, at one of which Labeo

habitually appeared, and at the other Capito. Any difference in principle or method between the two lawyers would naturally become emphasized by such a definite public position and would be encouraged and propagated by their pupils. The meaning of Pomponius' expression (*successit*) and of the series of successors becomes clear. The heads of parties were in fact on this theory successive occupants of rival professorial chairs. (Bremer, *Die Rechtslehrer*, &c. p. 68, who refers to Schrader as suggesting this notion.) The only other information which we have on this subject is Pliny's expression (*Ep.* vii. 24. § 8), *domus G. Cassi, huius qui Cassianae scholae princeps et parens fuit*, and the mention in Gaius and other lawyers of various controversies in which the two schools took different sides. But from the statement of Pomponius and the facts of Labeo's life, we may form a probable idea of the nature of the difference between these schools.

Labeo was a great student of Roman legal antiquities and a lover of the old constitution. On a superficial view one might have expected him to be a conservative lawyer. On the other hand, if one imported into Roman history the notions which naturally arise under monarchical governments, we should find in his republican politics a ground for the character of an innovator which Pomponius gives him. But there was in the position of Labeo no opposition between these tendencies. He saw the old republican freedom superseded by a monarchical rule, and the forms of the constitution employed to give the unconstitutional despotism a legal appearance. The proconsular *imperium* was exercised within the city, and the tribunicial power which had been created as a check upon the *imperium*, was combined with it in the person of the Princeps, and exercised for life instead of for a year. Nor could the old dictatorship serve as a just precedent. It was one thing on a great emergency to entrust extraordinary powers to a single officer for a time. It was a very different thing to perpetuate such a power, to establish it as a system, and attach it to one family. A constitutional lawyer may not be curious to inquire how far the form and substance are in their ancient relation to one another, if the forms are observed and the institution is undergoing a moderate and gradual development suited to the changes of the nation and of circumstances. But when a monarchy becomes aggressive, lovers of constitutional rights and precedents become alarmed, and a Pym and a Hampden raise the standard of revolt. And if a monarchy comes into being and grows irresistibly under the forms of a republic, a Labeo will find a natural



vent for his faith and knowledge in shewing the difference between the spirit and the letter of the law. The questioning spirit, once quickened and active, scrutinizes all matters in turn. What is the origin and purpose of the form? What is the meaning of the language used? Is the rule really based on a principle, or is it a mere temporary expedient which is no longer fitted to the circumstances? Has it not been extended to cases which were not within the original purview, or restricted in a way which makes it worthless or harmful?

Further Labeo was a man of varied culture and philosophical training (Gell. XIII. 10). Hence criticism would naturally take a scientific as well as a practical direction, and harmony of underlying principles would become a guide and object in his legal studies. The law must be not a mere bundle of rules, but a consistent whole.

The precise result of such a disposition in a mind of power is not easily calculable. It might vary considerably in different persons and circumstances, and assume a different aspect on one legal issue from what it would on another. The 'reason of the thing' might be found in rigor or in flexibility, in consistency of theory or in practical convenience, in strictness of logic or in the equity of the facts. If the professor was timid or comfortable, he might find in the excess of scepticism a ground for practical acquiescence: if self-confident or discontented, he would be eager to innovate. But in neither case would his method as a lawyer be wooden and mechanical. Labeo was bold and bitter, and the 'divine rage in his soul', which had its source or its fuel in politics, gave a restless life and vigour to his legal studies and made him stir the dry bones of law.

Labeo's questionings would meet with a certain and steady resistance from the numerous party who from one cause or another dislike change. There would be the mass of limited and slow-moving intellects, who could not understand the discussion; and of lawyers who having acquired the knowledge requisite for the routine of business were not disposed to go to school again, and to alter the practice to which they were accustomed. But these would not be all. Men of real capacity, whose caution was in excess of their scientific tendency, would find much reason in what was traditional and established, and be more willing to 'bear the ills they have, than fly to others that they know not of'. And politics would naturally play its part in the matter. Those who acquiesced, or even found their advantage in the new government, would inevitably look with sus-

picion on the opinions of Labeo, and be impelled by natural dislike, or prudential considerations, or worship of the powers that be, to oppose the innovator in law, as they would oppose the uncompromising republican in politics. As the hopes of republicans faded before the steady consolidation of the monarchy, the impetus given by Labeo would be confined to matters of private law and dissipate itself in a number of subordinate points. The stream would be lost in the sands and shallows. Both schools were represented by writers and teachers of conspicuous ability. We know of no special cause which would persistently make the followers of one school band together against those of the other, or elevate into great principles the divergencies of view on particular points or cases. Temporary enthusiasm for a teacher, temporary partisanship for a special opinion there probably was, but the points of view would be sometimes exchanged, the successor in the one school would sometimes agree with a predecessor in the other, and dissent from a predecessor in his own : some questions might come up for decision by an imperial rescript on a case ; others would be modified by the progress of legislation and the discussion of other parts of the law ; so that eventually—there is a century and a half between Labeo and Gaius—the remains of the active controversies of the first century would be the vigorous discipline of legal intellects, the purification and better grounding of legal doctrine, and the ticketing of opposing views on some particular questions with the names of the rival parties. A number of such questions are mentioned by Gaius in his Commentaries, and some others survive even in the Digest. It is not difficult to find arguments on each which might justify the idea that the one side favoured principle and the other convenience, or the one strictness and the other equity ; only it is difficult to confine such arguments to one side only. Either in turn might sometimes take either position. If we did not find the views ticketed, we might have attributed them to the wrong authors<sup>1</sup>.

<sup>1</sup> Dirksen in his elaborate and sensible dissertation 'on the Schools of the Roman Jurists' (*Beiträge*, Leipzig 1825), rejecting the notions of earlier writers that the one school regarded equity and the other *strictum ius*, comes to the conclusion that the Sabinians drew their opinions chiefly from experience, and clung to the letter of the rule or resorted to some analogy from the civil law, and paid only a subsidiary regard to equity ; while the Proculians looked to the inner meaning and object of the law and to systematic consistency (p. 46). Kuntze (*Excuse*, p. 323) finds the contrast of the schools in *utilitas* opposed to *subtilitas*, or, in still more general language, in naturalism opposed to idealism, on which he discourses in a somewhat romantic fashion. I have taken some references from Dirksen.

The following is a brief statement of the various questions which we know were debated between the schools. I give first those mentioned by Gaius, who often speaks of the Sabinians as *nostri praeceptores* or the like, and of the Proculiani as *diuersae scholae auctores* or the like; sometimes of *Sabinus et Cassius* for the one, and *Labeo et Proculus* for the other. There is no reason to suppose that all controversies became party questions, or that all lawyers were members of one party or the other. It is therefore desirable to confine the enumeration to those which it is tolerably clear were controversies between these schools of lawyers.

1. Gai. i. 196; Ulp. xi. 28. A male arrived at puberty was freed from being under a guardian. When was a person *pubes*? (Women being always under guardians were not concerned with this question.) Sabinus and Cassius &c. (*Cassiani* as Ulpian calls them) said it depended on the constitution of the particular individual, and for *spadones* the usual age must be taken. The Proculians (*Proculiani*, Ulp.) fixed one period for all, viz. the completion of the 14th year. Ulpian says that Priscus (Neratius? Javolenus?) contended for both conditions. One may fancy that the Proculians would say the bodily development is not the essential point, the mental development is; and for mental development age is a better and more convenient test. However that was, Justinian adopted the Proculian view (*Inst.* i. 22. pr.).

2. Gai. ii. 15. The Sabinians thought animals were *mancipi* from their birth: Nerva and Proculus &c. held that they were *mancipi* only when they were tamed; if they proved untameable, they must be ranked as *mancipi* at the usual age of taming. As only those animals were *mancipi*, *quae collo dorsoue domari solent* (cf. Vat. Fr. 259) i.e. oxen horses asses mules, it was natural to regard taming as of the essence of the distinction. And it is possible that the taming was looked at also as the domestication, in fact the inclusion of the animals in the family, and thus rendering them fit for the more solemn conveyance applicable to children and slaves. This controversy was obsolete in Justinian's time.

3. Gai. ii. 37 and iii. 87. A surrender in court of an inheritance had very different effects in different cases. It was effective, so as to make the surrenderee heir in place of the surrenderor in one case only, viz. if the surrenderor was statutable heir *ab intestato* and had not entered. It was nugatory, if the surrenderor was heir by the



will and had not entered. If however either of these persons surrendered after entering, he remained bound to the creditors, the debts perished altogether, and the tangible assets passed to the surrenderee. But how was it in the case of a necessary heir, i.e. a slave made free and heir by the will? He had no choice to accept or not; he was heir at once, and required no entry to perfect his heirship. A surrender in such a case, the Sabinians said, was nugatory. The Proculians held that it had the same effect in this as in other cases after entry. Evidently the Sabinians argued, he is necessary heir, therefore he cannot divest himself of the position. The Proculians would reply, Yes, but having become heir, he can by his own act transfer the tangible assets to another just as he can convey any single article. The necessity is only that there may be some one to be responsible to the creditors, and responsible he remains after surrender just as before. This controversy was obsolete in Justinian's time.

4. Gai. II. 79; D. xli. 1. 17. § 7. *A* manufactures an article out of *B*'s material, e.g. wine out of *B*'s grapes, a ship out of *B*'s planks, a dress out of *B*'s wool, a plaster out of *B*'s drugs, a bowl out of *B*'s silver. Whose property is the manufactured article? Sabinus and Cassius said it follows the material and therefore is *B*'s; Nerva and Proculus (*diversae scholae auctores*) said it was *A*'s, but *B* has a right of action against *A* for the unlawful use of his material, both the *actio furti* and a *condictio* (see p. 93). Justinian adopted a middle course, though leaning to the Proculians: *B* was to retain the property if the article could be reduced to its former condition (e.g. by melting down the vessel); if it could not, the manufacturer is the owner (*Inst.* II. 1. § 25).

5. Gai. II. 123. If a son in his father's power is neither made heir nor expressly disinherited but is passed over in his will, the will is invalid. But how if the son dies in his father's lifetime? It makes no difference, said the Sabinians: the will is invalid *ab initio*. On the contrary, said the Proculians, the death of the son removes the only obstacle to the father's will. The will takes effect only on the death of the testator: if there is no *suus heres* then, the testator's will is effectual. Justinian decided for the Sabinian view (*Inst.* II. 13. pr.).

6. Gai. II. 195. A thing bequeathed *per vindicationem* became, according to Sabinus and Cassius, &c., the property of the legatee

immediately the inheritance was entered on, whether he knew it or not: but if he repudiated, the legacy became null altogether. Nerva and Proculus &c. held that the legatee acquires no property till he accepts. A constitution of Antoninus Pius was considered to decide the point for the Proculian view. Cf. D. xxx. 1 44. § 1; Paul. *Sent.* iii. 6. § 7.

7. Gai. ii. 200. A thing bequeathed *per uindicationem* but conditionally—whose property is it, pending the condition? The Sabinians compared the case of a *statuliber*, and just as the slave remains the property of the heir, pending the condition of his freedom (cf. D. xl. 9. 1 29. § 1), so, according to them, the thing bequeathed remained the property of the heir. The Proculians held that the thing meantime belongs to no one (cf. Gai. ii. 9), and that the same applies to an unconditional legacy, before the legatee accepts it. Presumably the Proculians would argue that a legacy by *do lego* is evidently left away from the heir, and he can therefore have no right, till the legatee has refused it. The Sabinian view prevailed. See D. x. 2. 1 12. § 2 and notes p. 95.

8. Gai. ii. 216—222. *Per praeceptionem hoc modo legamus: Lucius Titius hominem Stichum praecipito.* This form of legacy was viewed differently by the two parties. If *capito* were substituted for *praecipito*, the legacy would be *per uindicationem*. Does *praecipito* practically differ from *capito*? The Sabinians said, Yes: it confines the legacy to heirs; only what is part of the inheritance, and consequently only what is the testator's own, can be so left; and the mode of claiming it is by a suit *familiae eriscundae*. A legacy in this form to an outsider is null. Sabinus himself thought that the *S. consuetum Neronianum* even did not cure the defect, but that was refuted by Julianus and Sextus (Africanus? see ch. xii.). The Proculians held that '*prae*', was not important, and that the legacy would be governed by the rules applicable to a direct bequest (*per uindicationem*), with the enlargement due to the *S.C. Neronianum*. The distinction among forms of legacies was abolished by Justinian (Cod. i. 43. 1 1; *Inst.* ii. 20. § 2).

9. Gai. ii. 231. A legacy or gift of freedom in a will, preceding the appointment of heir, counted for nothing. This was undoubted. Did the like rule apply to the appointment of a guardian? Yes, said the Sabinians. No, said Labeo and Proculus: the appointment of a guardian is valid, though it precede the words of institution of heir.

Nothing is thereby taken out of the inheritance. Justinian (*Inst.* II. 20. § 34; *Cod.* VI. 23. l 24) went further than the Proculians, and allowed legacies and freedoms to be valid, whatever part of the will they occupied. The order of writing was unimportant.

10. Gai. II. 244. Is a legacy to one who is in *potestate heredis* good? Servius said it was, and that too whether it was conditional or unconditional; but that it became invalid, if, when the legacy vested, the legatee was still in the power of the heir. Sabinus and Cassius thought a conditional legacy only was good; an unconditional legacy was bad; for if the testator died at once after making his will, the legacy could have no effect, and it was absurd to hold that the extension of the testator's life should have any effect on the validity of the will. The Proculians held that even a conditional legacy was bad, because no one, heir or not, can legally owe anything, conditionally or unconditionally, to those who are in his power. The Sabinian view prevailed, as we see from Ulpian XXIV. 23 *Ei, qui in potestate manu mancipiæ est scripti heredis, sub conditione legari potest, ut requiratur*<sup>1</sup> *quo tempore dies legati cedit, in potestate heredis non sit*; Just. *Inst.* II. 20. § 32.

11. Gai. III. 98. Legacy under an impossible condition (e.g. if the legatee touch the sky with his finger). The Sabinians held that the condition counted for nothing and the legacy was due unconditionally. The Proculians held that the legacy was as invalid as a stipulation on a like condition was. Gaius adds that in truth there is no good distinction in this matter between a legacy and a stipulation. Justinian adopted the Proculian view (*Inst.* III. 19. § 11).

12. Gai. III. 103. A man stipulates for himself *and* for an outsider (i.e. one in whose power he is not). All agreed that nothing was due to the outsider; but the Sabinians held that the whole, the Proculians that only half, was due to the stipulator. Justinian adopted the Proculian view (*Inst.* III. 19. § 4).

13. Gai. III. 141. Must price be in money? Sabinus and Cassius thought not, and appealed to Homer (*Il.* VI. 472—475) to shew that barter was the earliest form of purchase and sale. The

<sup>1</sup> This expression appears to have been misunderstood by Dirksen p. 73. He says the Sabinians held that a legacy to one in *potestate heredis* was valid, only if the express condition was attached to the legacy, that it should stand good if at the moment of vesting the legatee was no longer in *pot. hered.* I take *ut requiratur* to be the requirement of the law, not an express requirement of the testator.



Proculians thought it must; else no one could say which was the thing sold and which was the price, and it was absurd that both should be sold and both should be price. Caelius Sabinus (successor of Cassius) apparently replied to this argument, that the decision which was the thing sold and which was the price depended on which was offered for sale (*uenalis*). The Proculian view prevailed. Justinian said it was supported by other lines of Homer, and by stronger arguments, and had been admitted by previous emperors (*Inst.* III. 23. § 2).

Paul (D. XIX. 4. 1 1) explains the reason why such stress is laid on distinguishing the thing sold from the price. The buyer is liable on the contract if he does not make the seller owner of the purchase-money; the seller is only bound to guarantee the purchaser against fraud on his own part and against eviction. And sale differs from barter in that the contract of sale is complete on agreement being arrived at between the parties; barter is not complete till delivery is made on the one part. In other words purchase is a consensual contract, barter is a real contract. What the precise drift of the dispute in this case was is not clear, because the position of the law at the time is not known. Some hold that purchase was at that time confused with barter, and that the Proculians were desirous of separating it, so that mere agreement should be sufficient to make it a valid obligation (Pernice *Labeo* I. p. 465). Others hold that purchase was already a valid contract, and that the Sabinians were desirous to make barter into a consensual contract also (Bechmann *Kauf* I. p. 7).

14. Gai. III. 167. A slave, the common property of two persons, makes a stipulation, or receives by mancipation some object. If he does so expressly in the name of one of his masters, he acquires for that master only: if otherwise, he acquires for both in the proportion of their respective shares. If however he is acting at the order of one of his masters (without naming him), for whom does he then acquire? The Sabinians said the order was tantamount to his expressly naming that master (cf. D. VII. 1. 1 25. § 6), and consequently the slave acquired for that master only. The Proculians said, the order made no difference: both masters were entitled to the benefit of the slave's acquisitions. Justinian decided in favour of the Sabinian view (*Inst.* III. 28. § 3; Cod. IV. 27. 1 2 (3). § 2).

15. Gai. III. 168. Is an obligation dissolved by the payment, with the creditor's consent, of a thing different from that which was

agreed on? The Sabinians said it was dissolved *ipso iure*. The Proculians said it was not dissolved: *ipso iure* the debtor remained bound, but he could resist any action by the plea of fraud (*dolus malus*). Justinian adopted the Sabinian view (*Inst.* III. 29. pr.; cf. D. XIII. 5. 1 1. § 5).

16. Gai. III. 177, 178. Novation requires a different person or a different condition or a different time of payment, in fact some clear difference between the old and the new obligation. The Sabinians maintained that it was enough, if there was a security (*sponsor*) less or more. The Proculians said the addition or removal of a security had no effect. Justinian adopted the Sabinian view. Probably the Proculians argued that the change must be in the obligation itself, not in the number of persons who were to be liable on it.

17. Gai. IV. 78. A son or slave of another is liable to me on a tort: he comes by some means (e.g. by adoption or purchase) into my power. Is the claim, which I have for him to be surrendered to me *noxae*, finally merged and destroyed? The Cassians said, Yes, it is brought into a position in which it could not have originally existed. There could and can be no right of action between a master or father and slave or son in power. The Proculians thought that the claim to the noxal surrender lies dormant while the child or slave is in the offended man's power, but revives on his passing out of the power. Justinian approved of the Sabinian or Cassian view (D. XLVII. 2. 1 18; *Inst.* IV. 8. § 6). It is difficult to see how the Proculians could defend their position, at least on equitable grounds. But probably they took the same line as on No. 15. They would maintain that in strict law the claim was not affected. That followed the slave wherever he was until it was duly satisfied: but the purchaser or other alienor would in ordinary circumstances have a plea of *dolus malus* to protect him against the alienor's noxal claim.

18. Gai. IV. 79. In order to effect a noxal surrender of a son mancipation was required. Sabinus and Cassius held that one mancipation was sufficient; for the clause of the XII. tables, which spoke of three in the case of a son (see p. 167), applied only to voluntary mancipations. The Proculians held that the three mancipations were requisite in this case as in others; for the XII. tables said a son did not pass out of his father's power, except he be manci-

pated thrice. The form of mancipation in this as in other cases was obsolete in Justinian's time.

19. Gai. iv. 114. After suit has been accepted but before judgment the defendant satisfies the plaintiff. Ought the judge to acquit? Yes, said Sabinus and Cassius: all suits admit of acquittal, presumably at all stages. The Proculians agreed as regards *bonae fidei* actions, because the judge is there free: they agreed also as regards *in rem actiones*, because the right of acquittal is expressed in the formula. Here the ms. is mutilated. Kruger and Studemund suggest that Gaius proceeded to say that in the case of *condictiones* the satisfaction came too late. Huschke makes other distinctions. Justinian adopted the Sabinian view (*Inst.* iv. 12. § 2).

Dirksen connects with this controversy the references to Sabinus, Cassius, &c. in D. xxii. 1. 1 38. § 7; v. 3. 1 40. pr.; x. 2. 1 12. pr.

20. Gai. iv. 170. The ms. is so mutilated that the fact only of a controversy is clear.

21. Fr. Vat. 266 (Ulpian). A person bound in contravention of the *lex Cincia* (which forbade gifts of an immoderate amount, except to near relations) discharges the obligation by payment to a person not within the exceptions of that law. He can reclaim the money at any time by a *condictio indebiti*; for that is *indebitum*, against which the debtor has a standing plea, *perpetuo exceptione tutus*. The Proculians maintained that any one could use this plea, *quasi popularis sit exceptio*. The Sabinians denied this. In later times the heir certainly could reclaim it, unless it was shewn that the donor died without repenting of having made the gift. So much was declared by a constitution of Alexander Severus. The provisions of the *lex Cincia* are imperfectly known. It appears not to have voided gifts made in contravention of its provisions, nor to have inflicted a penalty for breach. See the opening words (mutilated) of Ulpian's *Regulae*. Some have thought the *condictio indebiti* was only applicable in this case as in others, where money had been paid in some mistake &c. (Savigny *System* iv. § 165; Keller *Pand.* ii. p. 580). The law appears never to have been repealed, but to have gone out of use, other regulations for the control and ascertainment of gifts being made by imperial constitutions (cf. Cod. viii. 53; *Inst.* ii. 7; Keller *Pand.* i. p. 159). In accordance with this, part only of this passage of Ulpian has been retained in the Digest (xii. 6. 1 26. § 3). See Puchta *Cursus* § 206; Keller *Pand.* ii. p. 576 sqq.



22. Just. *Inst.* III. 26. § 8. A man, who has a commission to buy a thing with a limit of price, buys it at a higher price. Can he compel his principal to take the purchase at the price limited? No, said the Sabinians. Yes, said the Proculians. Gaius (III. 161) states the Sabinian view without any mention of the other school. But in an extract from his *Rer. Cott.* given as D. XVII. 1. 1 3 we find, *sed Proculus recte eum usque ad pretium statutum acturum existimat, quae sententia sane benignior est.* The last words are adopted by Justinian in the *Institutes*. Probably the word *recte* is an insertion by Tribonian.

23. D. XXIV. 1. 1 11. § 3 (Ulp.). Gifts between husband and wife were invalid, but gifts in view of death were effective. Until the death the ownership remained with the donor. Marcellus says that if a husband makes a gift to his wife, being still in her father's power, and delivers the thing to her, the Sabinians considered that, if she was emancipated before her husband's death, the gift with all its accessories (e. g. interest, &c.) became hers on her husband's death. Julian approved this. The opinion of the Proculians is not stated. Probably they held that it became her father's directly due delivery was made.

24. D. XXIX. 7. 1 14 (Scaev.). A man makes a will with heirs instituted and others substituted in default. The instituted heirs die in his lifetime. After their death he makes a codicil revoking or adding legacies. Is the revocation or addition valid? Sabinus and Cassius were reported to have said yes, on the ground that codicils are to be taken as part of the will, and to take effect if that is good. Proculus dissented, and Scaevola approved of the dissent. A legacy given by a codicil to a man, alive when the will was made, but not alive when the codicil was made, is good for nothing. The same principle applies here: a bequest is addressed to the heir, and, if the heir is dead, the address is nugatory. So much when the instituted heir or heirs are dead. But suppose two instituted heirs, and one only dead. The one alive, when the codicil was made, will have to pay the entire legacy, the substitutes will have nothing to do with it. This presumes the legacy imposed in general words '*quisquis mihi heres erit*'.

25. D. XXX. 1 26. § 2 (Pompon.). If a testator bequeaths part of his goods (*bonorum pars*), Sabinus and Cassius held that this was a bequest of the named share of the value of the estate (less the debts,

I presume, cf. D. L. 16. 1 39. § 1 and notes p. 188). Proculus and Nerva held that it was a bequest of the named share of the things themselves. Pomponius (whose opinion is accepted by Justinian) gave the heir the option to do which he liked, but with this restriction that the share of the value must be paid in the case of things absolutely incapable of being divided, or at least incapable of being divided without loss.

26. D. xxxix. 6. 1 35 (Paul.). A gift made in view of death (*mortis causa*) is revocable by the donor during life. If the property was not intended to pass till the donor's death, then the donor could bring vindication. If it was conveyed with the condition of being reconveyed, if the donor got well or revoked the gift, then the proper action was a condictio, the ground on which the gift was made having given way (ib. 1 29). This last proposition is said to have been confidently maintained by the Cassians. What the view of the Proculians was is not told us. Possibly they held that an *actio in factum* was the proper remedy (cf. ib. 1 30 *uel utilem*). The dispute mentioned and decided by Justinian (Cod. viii. 56. (57.) 1 4) probably was of later times, and related to the particular formalities required for a valid gift.

27. D. xli. 1. 1 11 (Marcell.). A ward can alienate nothing without the presence and authority of his guardian (D. xxvi. 8. 1 9. § 1; § 5). He cannot even part with (*alienare*) natural possession according to the Sabinians. Justinian, through Marcellus, approves this view. What was the Proculian view? Probably that the authority of the guardian was a creation of the civil law, and had nothing to do with natural possession. Compare the language of Labeo (D. xliii. 26. 1 22. § 1) *quo magis naturaliter possideretur, nullum locum esse tutoris auctoritati*. Much seems to depend on what is meant by *alienare*. There is no doubt a ward could lose possession *corpore*, but whether he could legally transfer the possession is quite another matter. Cf. D. xli. 2. 1 29 (Ulp.) *Possessionem pupillum sine tutoris auctoritate amittere posse constat, non ut animo sed ut corpore desinat possidere; quod est enim facti, potest amittere. Alia causa est, si forte animo possessionem velit amittere, hoc enim non potest*.

28. D. xli. 7. 1 2 (Paul.); xlvii. 2. 1 43. § 5 (Ulp.). A thing abandoned by its owner, according to Sabinus and Cassius, ceased at once to be his. Proculus held that it continued his, until it was seized by some one else. The Sabinian view prevailed.

29. D. xlv. 1. 1 138. pr. (Venul.). A man stipulates for something to be paid on the days of a specified market (*certarum nundinarum diebus dari*). When may he claim it? Sabinus said on the first day of the market. Proculus and the other authorities of the opposing school thought the claim could not be made, till the market was entirely over. Ulpian agreed with them, and Justinian adopts this in the Digest. (On the reading see Mommsen *ad loc.* The *non* is evidently required by the sense.)

Dirksen (p. 113) points to the connexion of this dispute with that mentioned in D. xlv. 1. 1 115. § 2, where Sabinus maintains that a stipulated penalty for non-performance may be sued for as soon as the performance is possible. Pegasus maintains that the plaintiff must wait till performance is impossible. Papinian approves of Sabinus' view, provided that there is an express stipulation for the performance, and not merely for the penalty in case of non-performance.

30. Cod. vi. 29. 1 3. A similar point to that in No. 5 was the case of a child *en ventre sa mère* at the death of the testator, who, if he were born and there were none preceding him, would be *suus heres* (e.g. the testator's grandchild by a son in *potestate*). The testator passes him over in his will. If the child is born alive, even though he die without uttering a cry, the Sabinians held the will is broken. We are not told what the Proculians held, but presumably their view was that a cry was necessary as a proof of life. In the old German law a similar requirement (*das Beschreiben der Wände*) was made. Cf. Pernice *Labeo* p. 24; Gerber *Deutsches Privatrecht* § 34). Justinian decided in favour of the Sabinian view.

The above seem to be the only cases in which the existence of a controversy between the schools is clearly shewn either by express statement, or by the use of the name of the party *Sabiniani*, &c., or by opposing views being represented by leading members of the two parties. But there are a considerable number of other cases where such a controversy may be reasonably supposed, though it is also possible that there may have been no definite controversy at all, or one only between individual lawyers. Such cases, many of which are treated as controversies of the schools by Dirksen, are where an opinion is said to have been maintained by *Sabinus et Cassius*, or where some leading members of the schools are named.



In the following places *Sabinus et Cassius* are named, but we rarely know the opposite view or its supporters: Gai. III. 133 (Nerva opposes); D. v. 1. 1 28. § 5; IX. 4. 1 15; xv. 1. 1 3. § 9; 1 42; xvi. 3. 1 14. § 1; xviii. 1. 1 35. § 5; xxvi. 7. 1 37 (*bis*); XL. 4. 1 57 (opposed to *alii quidam*); xli. 2. 1 1. § 5 (*Sabino et Cassio et Iuliano placuit*); xli. 3. 1 4. § 16; 1 10; xlii. 3. 1 4. § 1; xliii. 16. 1 1. § 14.

Leading members are named in Gai. II. 178 *Sabinus* )( *alii*; D. II. 4. 1 8. § 2 *Celsus* )( *Iulianus*, cf. D. xxxvii. 14. 1 15; III. 5. 1 17. (18.) *Proculus et Pegasus*, also *Neratius*; xv. 1. 1 30 *Proculus et Pegasus*; xviii. 2. 1 14. § 1 *Labeo et Nerua*; xx. 4. 1 13 *Nerua, Proculus*; xxvi. 2. 1 33 *Trebatius* and *Iauolenus* )( *Labeo* and *Proculus*; xxxi. 1 20 *et Procuro placuit et a (Celso) patre accipi*; xxxiii. 7. 1 12. § 3 *et Labeo et Pegasus*; xxxiv. 2. 1 15 *Labeo* )( *Cassius*; xxxix. 2. 1 15. § 32 *Labeo* )( *Sabinus*; xli. 1. 1 27. § 2 *Cassius* )( *Proculus et Pegasus*; xli. 2. 1 1. § 14 *Nerua filius* )( *Cassius et Iulianus*; xlv. 1. 1 115. § 2 *Pegasus* )( *Sabinus*; 3. 1 28. § 4 *Proculus* )( *Cassius*; xlvi. 3. 1 93. § 3 *Sabinus* )( *Proculus*; 1 95. § 7 *Labeo et Pegasus*. And no doubt there are other instances of the like kind.

On the other hand, on some points there was cross voting among the leaders, e.g. Gai. III. 140, *Labeo* and *Cassius* agree against *Ofilius* (Capito's teacher) and *Proculus*; Vat. Fr. 1 *Proculus* and *Celsus* differ from *Labeo*; similarly Vat. Fr. 71 a; D. vii. 5. 1 3 *Nerva* differs from *Cassius* and *Proculus*; 8. 1 12. § 1 *Nerva* differs from *Sabinus et Cassius et Labeo et Proculus*; &c.

## CHAPTER X.

### JURISTS OF FIRST HALF OF FIRST CENTURY.

C. ATEIUS CAPITO is named by Pomponius as the leader of a school opposed to *Labeo*. He was a pupil or follower of *Ofilius*, and was contrasted with *Labeo* in two special ways; he was devoted to the new imperial system, and he adhered closely to the old paths in law (D. i. 2. 1 2. § 47). His grandfather was one of Sulla's centurions, his father had been praetor (Tac. A. III. 75). If this praetor was C. Ateius, the tribune of B.C. 46, *qui Caesarem semper coluit et dilexit* (Cic. Fam. XIII. 29. § 6; see above, p. cxvii), Capito's

politics were hereditary; and there seems to be nothing against this view<sup>1</sup>. In A.D. 5 he was made consul, receiving that dignity earlier than he would have done, because Augustus was desirous to prefer him to his great rival Labeo, whose republican independence was in marked contrast to Capito's obsequious flattery of the ruling power. Tacitus tells how, when a Roman knight, L. Ennius, was accused of treason, because he had melted down a silver statue of the emperor for some ordinary purpose, and Tiberius put a veto on the charge, Capito interfered and claimed for the senate the right of deciding what action should be taken against such a wrong, done not only to the emperor but to the state (*Tac. A. III. 70*). Again Tiberius used in a decree respecting new year's gifts a word, which as it occurred to him in the night, was not good Latin, and the next day sent for the philologists to advise him. M. Pomponius Marcellus, a purist in Latin, found fault with it. Capito said it was Latin, and that, if it had not been before, it would be for the future; to which Marcellus replied that Capito told a lie, 'For, Caesar, you can give citizenship to men but not to words' (*Suet. Gram. 22*; *Dio LVII. 17*).

Capito was, with L. Arruntius, charged with relieving the city from the inundations of the Tiber A.D. 15, but their proposal to divert some of the rivers which supplied it was energetically opposed, and nothing was done (*Tac. A. I. 76, 79*). He was appointed *curator aquarum* A.D. 16, and apparently held office till his death (*Frontin. Aq. 102*), which occurred A.D. 22. His fame as a lawyer was great. Tacitus classes him and Labeo together as the two ornaments of peace (*ib.*), and speaks of his having, by his flattery to the emperor, cast a slur upon his high public position and his good private reputation (*ib. 70*). He is called by Tacitus *divini humanique iuris sciens*; by Gellius (*x. 20. § 12*) *publici priuatique iuris peritissimus*; by Macrobius (*Sat. VII. 13. § 11*) *pontificii iuris inter primos peritus*.

Some fragments, preserved in Gellius and elsewhere, are from his works called *Coniectanea, libri de pontificio iure* and *liber de officio senatorio*. The *de iure sacrificiorum* is taken to be a part of the second. The fragments preserved contain historical anecdotes,

<sup>1</sup> There were however others of the name. In one of the senate's decrees which preceded the rupture between Pompey and Caesar the name of *L. Ateius L. f. An(iensi tribu) Capito* appears among those concerned with the drafting of the decree, and presumably on the side opposed to Caesar. Curio, afterwards Caesar's active supporter, is in the same position. What relation Lucius was to Caius we know not. An inscription naming *L. Ateius M. F. Capito* is also found in *Corp. I. Lat. i. 1341*.

etymologies, definitions, distinctions of words, and bits of antiquarian lore. They are collected in Huschke's *Iurispr. anteiustiniana*.

He is quoted in the Digest by Proculus (VIII. 2. 1 13. § 1); and by Ulpian (xxiii. 2. 1 29). For citations of 'Ateius' see above, p. cxvi. Some, probably all, refer not to this Capito, but to the pupil of Servius, who may have been this Capito's father.

MASURIUS SABINUS succeeded Capito as head of his school, but gave its doctrines additional point, and gained for himself a permanent reputation by his systematic treatment of the civil law. He was the first who gave opinions on legal points publicly, this privilege being granted to him unasked by Tiberius, as Pomponius says (D. i. 2. 1 2. §§ 48, 50), though precisely what is meant thereby is not clear. Probably his opinions so given obtained legal authority in the courts. His means were small, and in fact he was largely dependent on contributions from his scholars. At about the age of 50 he was enrolled among the Equites. He lived long enough to comment on the *S.C. Neronianum*. An inscription at Verona contains among the names of the *fanorum curatores* that of *C. Masurius C. F. Sabinus* (C. I. L. v. 3924). Borghesi has suggested that this refers to the lawyer, and that he was a native of Verona (Teuffel-Schw. § 281. 1).

He is named in the Florentine Index as the author of three books on the Civil Law, but no extract from this famous work is found in the Digest. Three jurists of the first rank wrote commentaries on it, Pomponius in 35 books, Ulpian in 51 books, and Paul in 16 books (though a 17th book, a 20th book, a 32nd book and even a 47th book are named, doubtless by copyists' mistakes, in the Digest xxxix. 5. 1 4; xii. 5. 1 1; xli. 3. 1 31; liv. 7. 1 10; see Mommsen's large ed.); and extracts from these commentaries form nearly a seventh of the whole Digest. From a comparison of the extracts from these commentaries (Leist. *Versuch einer Gesch. d. röm. Rechtssysteme* and Rudorff *R. G.* i. p. 168) we may infer the principal matters and order of Sabinus' work to have been something as follows. 1. Wills and intestate succession; legacy, freedmen's services and *statuliberi*. 2. Alienation *inter vivos*, e.g. sale, partnership, partition, gifts between husband and wife, dowry. 3. Guardianship. 4. Theft, Aquilian damage, *damnum infectum* and *operis novi nuntiatio*. 5. Conditions, *actio de peculio*, actions on the aediles' edict; stipulations, securities, payment. 6. Protection of property, e.g. *rei vindicatio*, *iuramentum in litem*, *interdicta de vi, quod vi aut*



*clam* and *de precario*; acquisition of property, possession and usucapion; servitudes; pledge; *postliminium*. The last division (6) was apparently not treated by Ulpian.

Other works of Sabinus are mentioned, *Commentarii de indigenis*, *Fasti* (at least 2 books), *Memorialia* (at least 11 books), fragments from which are collected in Huschke's book. The second book of *Responsa* is named in D. xiv. 2. 1 4. pr.; the 5th book *ad Edictum praetoris urbani* in D. xxxviii. 1. 1 18; and books *ad Utellium* in D. xxxii. 1 45; xxxiii. 7. 1 12. § 27; 9. 1 3. pr. References to Sabinus in the Digest and Vat. Fr. are frequent—between 200 and 300. Persius no doubt referred to him in the lines *Cur mihi non liceat, iussit quodcumque uoluntas, excepto si quid Masuri rubrica uetauit* (*Sat.* v. 90). His name was applied to denote the school opposed to Proculus. See above, p. cxxxi &c.

On the Masurius Sabinus of Ulpian's time see below, ch. xiv.

NERUA, i.e. *M. Cocceius Nerva*, is named by Pomponius as the successor of Labeo in his school. The family was distinguished. L. Cocceius (Nerva) was consul *suffectus* with P. Alfenus Varus B.C. 39 (*Corp. I. L.* i. p. 467). M. Cocceius Nerva was consul B.C. 36 (ib. pp. 449, 467). He himself was consul *suffectus* with C. Vibius Rufinus in some year before A.D. 24 (Nipperdey on Tac. *An.* iv. 58). In the year 24 he was *curator aquarum* and held the office till his death. In A.D. 26 he accompanied Tiberius in his retirement from the city, being the only senator of consular rank who formed one of Tiberius' small retinue (Tac. *An.* iv. 58). In A.D. 33, while in good health and reputation, he determined to die. Tiberius went to him, asked for the reason, and implored him to change his mind: 'it would be a severe trial for his own feelings and fame, if so constant a follower, the nearest of his friends, abandoned life without reason for death'. Nerva declined discussion and starved himself to death. Those who knew him well said, that in fear and indignation at the woes impending on the state he preferred an honourable end, while his character was unsullied (Tac. *An.* vi. 26). He was grandfather of the Emperor Nerva. Frontinus speaks of his being *scientia iuris illustris*; Tacitus says *omnis diuini humanique iuris sciens*. His opinions are quoted over 30 times in the Digest, e.g. vi. 1. 1 5. § 3 *Uarus et Nerva*; vii. 5. 1 3; 6. 1 1 *Labeonis et Neruae*; 8. 1 12. § 1; x. 3. 1 6. § 4; xii. 4. 1 7 *Nerva Atilicinus responderunt*; xv. 1. 1 4. § 3 *et Neratius et Nerva*; xvi. 3. 1 32; xviii. 1. 1 1. § 1; xxiii. 3. 1 56. § 3;

xxx. 1 26. § 2; XLIII. 8. 1 2. § 28, &c.; Gai. II. 15; 195; III. 133. One opinion is specially noticeable. Property belonging to a tenant and on the premises was held to be tacitly pledged for rent (D. xx. 2. 1 4; 1 6). On the rent being in arrears it appears to have been usual for the landlord to take an inventory and close the doors. Slaves were of course included in the property, but could be manumitted before the doors were closed. Nerva appears to have held that a slave could still be manumitted, if the master could perform the essential act of personal manumission, and shewed that if the slave appeared at a window this could be done. The opinion was however rejected with scorn by other lawyers (*derisus Nerva iuris consultus qui per fenestram monstrauerat seruos detentos ob pensionem liberari posse* D. xx. 2. 1 9). The closing of the doors must therefore be taken as rather a conventional mark of a change of legal circumstances, than the interposition of a mere physical difficulty. Cf. Cujac. *Obs.* xvii. 39.

CASSIUS, i.e. C. Cassius Longinus, succeeded Sabinus. He was of the Cassian family well known in Roman history, from which came the conspirator against Caesar. His mother was daughter of the jurist Tubero and granddaughter of Servius Sulpicius, whom he was in the habit of calling his great grandfather (*proauus* Pompon. D. i. 2. 1 2. § 51). There has been some confusion between him and L. Cassius Longinus<sup>1</sup>, whom Tiberius selected as the husband of Drusilla (Tac. *A.* vi. 15). Both were consuls in the same year A.D. 30, M. Vinicius and L. Cassius being the regular consuls, and L. Naevius Surdinus and C. Cassius being *suffecti* (*Corp. I. L.* x. 1233). Pomponius gives his colleague the name of Quartinus (a mistake for Surdinus). C. Cassius was legate propraetor of Syria in A.D. 49 and, though there was no war, kept the legions in a state of active preparation for it (Tac. *An.* xii. 12). Amongst other things he directed the Jews to transfer the high priest's robe into the tower of Antonia in order that it might be under the control of the Romans. But the Jews procured from Rome permission to retain it (Joseph. *Arch.* xv. 11. § 4, cf. xx. 1. § 1). In A.D. 58 the senate, in

<sup>1</sup> L. Cassius was proconsul in Asia in A.D. 41, and fetched back to Rome as a prisoner and executed by Caligula, who had been warned by an oracle to beware of 'Cassius'. Cassius Chaereas was the name of the tribune of the praetorians who afterwards killed Caligula (Suet. *Calig.* 57; Dio LIX. 29 who confuses Lucius with Gaius Cassius). Another L. Cassius Longinus was consul *suffectus* A.D. 11 (Wilmanns 104).

delight at Corbulo's defeat of Tiridates and destruction of Artaxata, proposed the permanent celebration of it by keeping as festivals the day of the victory, the day of the news reaching Rome, and the day of that meeting of the senate. C. Cassius agreed to other proposals, but with grave irony objected that, if thanks to the gods were to equal this happy stroke of fortune, the whole year would not be sufficient; and reminded them that while it was right to devote some days to religious observances, others must be kept for human needs (Tac. *An.* XIII. 41). Later in the year he was chosen to calm a civic disturbance at Puteoli, but his stern character was not acceptable to the deputations from the place, and at his own request the charge was transferred to some brothers *Scribonii* (ib. 48). Soon after Piso's conspiracy Nero's suspicions fell on Cassius and on his wife's nephew Silanus, who had been brought up by Cassius (ib. xv. 52). The dignified character and ancestral wealth of the one, and the youth and nobility of the other were their real offence. Nero gave the first indication of his displeasure by forbidding Cassius to attend the funeral of Poppaea. Soon afterwards he sent a letter to the senate requesting the removal of both Cassius and Silanus from the state. He charged Cassius with having among the images of his house one of C. Cassius, inscribed '*Duci partium*', and with having sought to renew his ancestor's conspiracy by putting forward Silanus as an aspirant to the throne. Cassius was banished to Sardinia, Silanus was banished and killed. Cassius' wife, Lepida, the aunt of Silanus was charged with incest and awful sacrifices, but her fate is not told us (ib. xvi. 8, 9). Suetonius, who mentions that Cassius was blind, says or implies that he was ordered to put himself to death within three hours, and did so (*Nero* 37). This appears to be a mistake. For Pomponius, agreeing with Tacitus in the sentence of banishment, says that he was recalled by Vespasian and died afterwards.

Cassius' fame as lawyer was great. *Ea tempestate Cassius ceteros praeinebat peritia legum* (Tac. *An.* XII. 12). Hyginus (Grom. p. 124) calls him *prudentissimus uir, iuris auctor* on occasion of mentioning a decision he gave relative to changes wrought by the winter current of the Po. The decision was this. If the stream gradually carried away part of a man's land, he had no right to claim any accretions there might be on other land; it was his own fault not to have better secured the bank (Grom. pp. 49, 50 and my notes below, p. 72). But sudden and violent action of the stream might estab-



lish a new course instead of the old one, or might make an island. In such cases the ownership was not affected: the owner might follow his land, and if the land of several owners was affected, they would be proportionately intitled to the land in its new form. On another matter, one of the policy of the criminal law, Cassius is said by Tacitus to have taken a leading part in the discussion in the senate. Old custom, sanctioned and regulated by various decrees of the senate, of which the first called *Silanianum* is referred to A.D. 10, another to the following year (D. xxix. 5. l 13; Cujac. *Observ.* i. 18), another under Claudius, another under Nero called *S. C. Neronianum* or *Pisonianum* from the consuls of the year A.D. 57 (Paul. *Sent.* iii. 5. § 5; D. l. c. l 8; Tac. *An.* xiii. 32), had required that, when a man was killed, all his slaves, under the same roof and not proved to have assisted him, should be put to question and death. In A.D. 61 the city praelect, Pedanius Secundus, was murdered by one of his slaves. The people were disposed to resist the execution of this extreme measure upon four hundred slaves. Cassius, as reported by Tacitus, strenuously opposed any relaxation as dangerous to the safety of every master. ‘The old laws were right, and change ‘was always for the worse. It was impossible for the murderer to ‘have accomplished his object, if he had not profited by the connivance of his fellows. These large bands of slaves of foreign ‘nations, uninfluenced by the religious rites and scruples of Romans, ‘could be ruled only by fear. And if there were some innocent ‘among so many guilty, their fate cannot be weighed against the ‘public good; it was only what was impossible to avoid when a ‘great example has to be made.’ The slaves were executed (Tac. *An.* xiv. 42—45).

But the best evidence of his reputation as a lawyer is the fact that the school which was headed by Capito and Sabinus in succession was frequently called by Cassius’ name. Cf. Plin. *Ep.* vii. 24. § 8 *Laetor quod domus aliquando C. Cassi, huius qui Cassianae scholae princeps et parens fuit, serviet domino non minori. Implebit enim illam Quadratus meus*; whom Pliny thought as great an orator as Cassius was a lawyer. This school was apparently called indifferently either by the names of Cassius and his master (D. iv. 8. l 19. § 2) Sabinus, e.g. *Sabinus et Cassius ceterique nostri praeceptores* (Gai. i. 196; ii. 195, &c.), *Sabino et Cassio visum est* (ib. iii. 133, &c.), *et veteres putant et Sabinus et Cassius scribunt* (Vat. Fr. 1); or by that of *Sabiniani* (D. xxiv. 1. l 11. § 3; xli. 1. l 11, &c.), or

*Cassiani* (Ulp. xi. 28; D. i. 2. 1 2. § 52; xxxix. 6. 1 35. § 3; xlvii. 2. 1 18). See above, p. cxli.

He wrote a work on *Ius civile*, the 8th book of which is cited in D. vii. 1. 1 7. § 3; 1 9. § 5; 1 70. § 2; and the 10th book in ib. 1 70. pr. Aristo wrote notes on it, ib. 1 7. § 3; 1 17. § 1 *Aristo apud Cassium notat*; xxxix. 2. 1 28; cf. iv. 8. 1 40. Javolen wrote a work in 15 books from which there are a considerable number of extracts in the Digest, where it is called simply *Javolenus ex Cassio* (e.g. D. viii. 2. 1 12). Cassius himself wrote notes on Vitellius (*et Sabinus definit et Cassius apud Uitellium notat* D. xxxiii. 7. 1 12. § 27), and on Urseius Ferox (*Cassius apud Urseium scribit* D. vii. 4. 1 10. § 5; but cf. xxiv. 3. 1 59; xlv. 5. 1 1. § 2). His opinions are frequently referred to (between 100 and 200 times) by other lawyers; e.g. D. i. 9. 1 2 (*Cassius Longinus*); ii. 1. 1 11. § 2 (*Cassio et Pegaso*); 4. 1 4. § 2 (*Gaius Cassius*); iv. 6. 1 26. § 7 (*edicebat Gaius Cassius*), &c.

FULCINIUS, once called *Priscus Fulcinius* (D. xxxi. 1 49. § 2), lived after Labeo and apparently before Proculus (ib. and xxv. 2. 1 3. § 1 where he is joined with Mela), certainly before Neratius, who reports an opinion of Fulcinius with a note of his own (xxxix. 6. 1 43). Further he is quoted by Pomponius (xxiv. 1. 1 29. pr.), by Gaius (xi. 7. 1 29. § 2), by Paul (xiii. 1. 1 13; xxv. 2. 1 6. pr.; xliii. 16. 1 8; l. 16. 1 79), and by Ulpian (xxv. 1. 1 3; xlii. 4. 1 7. pr.).

MELA, called *Fabius Mela* in D. xliii. 23. 1 1. § 12, is quoted 34 times in the Digest, often on points on which Labeo's opinion is also given. He appears to have written before Proculus (cf. ix. 2. 1 11. pr.; xxv. 2. 1 3. § 1). He is quoted once by Venuleius (xlii. 8. 1 25. § 8); twice by Africanus (xlvi. 3. 1 39; l. 16. 1 207); six times by Paul (e.g. xvii. 1. 1 22. §§ 9, 11; xxv. 2. 1 3. § 4 *Mela Fulcinius aiunt*); otherwise only by Ulpian (v. 1. 1 2. § 6; xv. 3. 1 7. § 2; xix. 1. 1 17. § 6 *Gallus Aquilius, cuius Mela refert opinionem*; 2. 1 13. § 8; 5. 1 20. § 1; xxiv. 3. 1 24. § 2; xxvii. 3. 1 1. § 6; xxxiii. 1. 1 14; xliii. 14. § 8; xlv. 3. 1 39 *Mela libro decimo scribit*; xlvii. 2. 1 52. § 18, &c.). There are no extracts in the Digest.

CARTILIUS is mentioned twice in the Digest: viz. by Proculus xxviii. 5. 1 70 (69), where Proculus is asked to decide between the opinions of Trebatius and Cartilius, and by Ulpian xiii. 6. 1 5. § 13.

*ARRIANUS* is quoted by Ulpian (D. v. 3. 1 11 *Arrianus libro secundo de interdictis putat teneri, quo iure nos uti Proculus scribit*, from which it may be inferred that he was earlier than Proculus; xxviii. 5. 1 19 *ex facto agitatum Pomponius et Arrianus deferunt... Et Pegasus quidem existimat ad eam partem admitti, Aristo contra putat, quia &c., quam sententiam et Iauolenus probat et Pomponius et Arrianus, et hoc iure utimur*; xliii. 3. 1 1. § 4 *bellissime Arrianus scribit*); and by Paul *ad Plautium* (xxxviii. 10. 1. 5; xliv. 7. 1 47). Some have identified him with Arrianus Maturus, whom Pliny describes *Ep.* iii. 2, and to whom he writes several letters (i. 2; ii. 11; 12; iv. 8; 12; vi. 2; viii. 21). But Pliny's Arrianus does not appear to have been a lawyer. Another, Arrianus Seuerus, is mentioned as *praefectus aerarii* in or after Trajan's time (D. xlix. 14. 1 42). The identification of either with our Arrianus would conflict with the natural, though not necessary, inference from D. v. 3. 1 11.

*PROCLUS.* All we really know of Proculus is what Pomponius tells us. *Nervae successit Proculus. Fuit eodem tempore et Nervae filius: fuit et alius Longinus ex equestri quidem ordine, qui postea ad praeturam usque peruenit. Sed Proculi auctoritas maior fuit, nam etiam plurimum potuit: appellatique sunt partim Cassiani, partim Proculiani (Proculeiani Flor.), quae origo a Capitone et Labeone coeperat. Cassio Caelius Sabinus successit, qui plurimum temporibus Uespasiani potuit: Proculo Pegasus, qui temporibus Uespasiani praefectus urbi fuit. Caelio Sabino Priscus Iauolenus.* As Nerva died A.D. 34, Proculus probably flourished in the reign of Tiberius and the following Caesars. His name is supposed to have been Sempronius on the strength of D. xxxi. 1 47 (where however Mommsen proposes to read *Sempronius Nepos Proculo suo salutem*, which accords with the subsequent *Proculus respondit*), and of an inscription (Gruter p. 560) which may or may not refer to the jurisconsult. The cognomen Proculus was common enough, as may be seen from Wilmanns' *Inscriptions* (*Indices* p. 393). A jurisconsult of the name is mentioned in the *Testam. Dasumii* (Bruns<sup>4</sup> p. 229) which is of the date of 109 A.D.; and Rudorff inferring from D. xxix. 2. 1 60; 1 62; xxxv. 1. 1 40. § 5 *et ego (Iauol.) et Proculus probamus*, that Proculus the well-known jurist was a contemporary of Javolen, thinks the mention in Dasumius' will to relate to him, and his succession to Nerva not to have referred to any definite post, but to a gradual recognition of his preeminence in the school of Labeo (*Z. G. R.* xii. 338).



But Pomponius evidently makes Proculus to belong to a generation before Vespasian, and Javolen's *probamus* need not at all imply that the two were contemporary.

The Florentine Index names one work of Proculus, Epistles in 8 books. They contained opinions on special cases submitted to him. From this work there are 37 extracts in the Digest occupying 6 of Hommel's pages. Three extracts are from the 11th book, which does not accord with the Flor. Index. He wrote notes on Labeo (D. III. 5. 1 9. (10.) § 1; xxxv. 1. 1 69). An extract in the Digest (xxxiii. 6. 1 16), following an extract from Proculus' Epistles, is inscribed as *Idem libro tertio ex posterioribus Labeonis*. Either this is from the notes to Labeo (cf. xvii. 2. 1 65. § 5) or more probably *Idem* is a mistake for Javolenus (so Mommsen *ad loc.*). Proculus is also cited 134 times in the Digest and several times in Gaius and the Vatican Fragments. In a rescript of Marcus Anton. and Verus his opinion is referred to with respect: *Proculum, sane non leuem iuris auctorem* (D. xxxvii. 14. 1 17. pr.). His eminence is shewn by such expressions as *Nerva et Proculus et ceteri diuersae scholae auctores* (Gai. II. 15; 195); and *Proculeiani* (Ulp. xi. 28; Vat. Fr. 266; Just. II. 1. 25).

Some of the most noticeable extracts from Proculus are D. viii. 6. 1 16; xvii. 2. 11 76—80; xviii. 1. 1 68; xli. 1. 11 55, 56; xlv. 1. 1 113; xlix. 15. 1 7; l. 16. 11 124—126.

NERUA *filius*, as he was called to distinguish him from his father M. Cocceius Nerva, was a leader of the school of Labeo at the same time as Proculus, but of inferior authority. At the age of 17 or a little more, he acted publicly as a jurisconsult (D. III. 1. 1 1. § 3). He was a favourite of Nero's, who assigned to him (A.D. 65), along with Petronius Turpilianus and Tigellinus, triumphal ornaments to commemorate his victory over Piso's conspiracy. Nerva was praetor designate at the time (Tac. *An.* xv. 72). He is supposed to have been the father of the emperor Nerva.

He wrote a work *de usucapionibus* which is cited by Papinian (D. xli. 2. 1 47); and his opinions are often quoted in the Digest, e.g. III. 2. 1 2. § 5; vii. 1. 1 13. § 7; xv. 1. 1 3. § 8; xl. 2. 1 25; xli. 2. 1 1. pr.; § 3; § 22; 1 3. §§ 13, 17; xlvi. 4. 1 21.

## CHAPTER XI.

## JURISTS OF SECOND HALF OF FIRST CENTURY.

PEGASUS, according to Pomponius, succeeded Proculus in the school started by Labeo, and was himself succeeded by Celsus the father. Pomponius says also that he was praefect of the city in the time of Vespasian. Juvenal (iv. 77) speaking of an event in Domitian's reign mentions the presence of Pegasus; *attonitae positus modo uillicus urbi interpres legum sanctissimus, omnia quamquam temporibus diris tractanda putabat inermi iustitia*. On this the scholiast remarks that he was the son of a trierarch, that his name was taken from the figurehead of his father's vessel, that he was governor of several provinces, and afterwards *praefectus urbi*, and was so famed for his knowledge of law that the people called him a book rather than a man, and that the *S.C. Pegasianum* was named from him. Some difficulty has been found in *positus modo*. But the reigns of Domitian and Vespasian were separated by only two years, and, if he was appointed praefect just before Vespasian's death, the expression seems quite intelligible. Two alterations of the law are referred by Gaius to senate's decrees passed in the consulship of Pegasus and Pusio, one removing the maximum limit of age imposed by the *lex Aelia Sentia* on Latins, who by marrying and having children were allowed to claim Roman citizenship (Gai. i. 31); and the other giving an heir, who was charged with a trust to restore the inheritance, a right to retain one-fourth (ii. 254), and, in case the heir refused to enter at all from doubts of the solvency of the inheritance, empowering him to do so, at the request of the *cestui que trust*, without incurring liability (ib. 258). Justinian amended the *S.C. Trebellianum* so as to render the *S.C. Pegasianum* no longer necessary (*Inst.* ii. 23. § 7). The *Institutes* refer this *S.C. Pegasianum* to the time of Vespasian (ib. § 5).

No extract from any work of his is given in the Digest, but he is cited 28 times: e.g. D. ii. 1. 1 11. § 2; iii. 2. 1 2. § 5; 5. 1 17 (18); iv. 8. 1 21. § 10; v. 4. 1 1. § 3; vii. 1. 1 9. § 3; 1 12. § 2; 1 25. § 7; ix. 2. 1 5. § 2; xv. 1. 1 30. pr.; xxviii. 5. 1 19; xxxii. 1 12; xxxiii. 7. 1 12. § 3; xxxix. 5. 1 19. § 6; &c.

CAELIUS SABINUS is named by Pomponius as of most influence in the time of Vespasian. He succeeded Cassius in the school formed by

Capito, and was succeeded by Javolenus. He was (with Flavius Sabinus) *consul suffectus* A.D. 69, having been appointed by Otho, and confirmed by Vitellius (Tac. *H.* 1. 77). His full name is given in the *Act. Arual.* of that year as *Cn. Arulenus Caelius Sabinus*. He wrote a work *de edicto aedilium curulium* from which one short extract is given by Gellius (iv. 2. §§ 3—5), and probably another (ib. vi. (vii.) 4. §§ 1—3). He is cited by Gaius III. 70; 141; and by Ulpian and others in several places on the Aediles' edict, xxi. 1. ll 14, 17, 20, 38, 65; also xxxv. 1. l 72. § 7.

URSEIUS FEROX is chiefly known from the title of a work attributed to Julian in the Florentine Index, from which there are 43 extracts in the Digest, filling five of Hommel's pages. The precise nature of Julian's four books *ad Urseium Ferozem* is not certain. In three extracts (xxiii. 3. l 48; xxx. l 104; xlvi. 3. l 36) after a certain amount of matter come the words *Iulianus notat*. So Ulpian D. x. 3. l 6. § 12 has *Urseius ait*, &c. followed by *Iulianus autem recte notat*. In an extract from this work which forms xvi. 1. l 16. § 1 we have *Gaius Cassius respondit*, &c. followed by *Iulianus autem recte putat*. This last has probably been altered by Tribonian. But the other passages seem to shew that the work was really not a commentary of Julian's on a work of Urseius Ferox, but the work of Urseius edited with notes by Julian (so also Mommsen *Z. R. G.* vii. 483), and therefore probably the language generally in these extracts is that of Urseius, not of Julian. Hence *Cassius apud Urseium notat* (D. vii. 4. l 10. § 5) probably refers either to some notes written by Cassius on this work, and retained by Julian, or to some notes of Cassius quoted by Urseius. And the like may be said of *Cassius existimasse Urseium refert* (D. xliv. 5. l 1. § 10), where Mommsen inclines to correct it to *Cassium...Urseius*. Several of the extracts contain answers given by Sabinus, e.g. D. vii. 1. l 35; xxx. l 104. § 7, &c.; *Collat.* xii. 7. § 9; or Proculus e.g. D. ix. 2. l 27. § 1; x. 3. l 5; &c.: one at least contains an answer of Gaius Cassius (D. xvi. 1. l 16. § 1), and so probably D. xxiv. 3. l 59, where 'Gaius' is named. In another (D. xxxix. 6. l 21) we have *plerique, in quibus Priscus quoque, responderunt*. Priscus is probably Javolen.

Perhaps the easiest explanation of the facts is that Urseius lived about the time of Nero, that Cassius wrote some notes on his work, and Julian incorporated them with his own; and that the passages in which Cassius and Priscus are referred to are part, not of the



work of Urseius, but of Julian's notes to it. Paul was doubtless referring to the same work, when he says *apud Ferozem Proculus ait* (D. xxxix. 3. 1 11. § 2). In the *Collatio* i.e. the 10th book of Urseius is mentioned. Probably this is a mistake.

ATILICINUS is often (27 times) mentioned in the Digest as an authority, frequently beside Proculus or Nerva, e.g. D. ii. 14. 1 27. pr. *Neratius Atilicinus Proculus*; iv. 8. 1 21. § 9 *Proculus et Atilicinus*; viii. 3. 1 5 *Neratius hoc Proculum et Atilicinum existimasse ait*; x. 3. 1 6. § 3 *Sabinus et Atilicinus responderunt*; xii. 4. 1 7 *Nerua Atilicinus responderunt*; xvii. 1. 1 45. § 7 *Nerua Atilicinus aiunt*; xxxii. 1 19; xxxiv. 3. 1 16; xxxv. 2. 1 49. pr. *Atilicinus Nerua Sabinus*; xliv. 4. 1 4. § 8; xlv. 2. 1 17 *Atilicinus Sabinus Cassius*; but also by himself, e.g. D. xx. 6. 1 6. § 2. He is cited by Julian *Dig.* xvi. (D. xii. 4. 1 7) and Pomponius vi. *ad Sab.* (D. xxx. 1 48) and Neratius (above). See also Vat. Fr. 77. In xxiii. 4. 1 17 we have an answer by Proculus to a case put by Atilicinus. There is no reason for refusing to identify the questioner with our jurist, so that we may well consider him to have been somewhat younger than Proculus.

An opinion of his is reported by Aufidius (*Anfidius* ms.) Chius in the Vat. Fr. 77. Aufid. Ch. is alluded to in Mart. v. 61.

PLAUTIUS must have been an important writer, as Neratius wrote on him in several books (*Neratius libris ex Plautio ait* D. viii. 3. 1 5), Javolenus in five books, Pomponius in seven books, and Paulus in 18 books. In the Florentine Index the three last works are mentioned and are all called *ad Plautium*; but in the inscriptions to the extracts themselves Javolen and Pomponius' works are called, like that of Neratius, *ex Plautio*. (The sole exceptions D. vii. 1. 1 49 *Pompon. ad Plautium* and xxv. 3. 1 34 *Iavolenus ad Plautio* (so F) are clearly mistakes.) The extracts from Paul's work are always inscribed *ad Plautium*. What this difference in title indicates is not certain: but, as Paul's work was so much more voluminous than the others, it is natural to suppose that he edited and commented on the whole of Plautius, and that the others commented on selections only. The number of extracts from Javolen's work are 18, occupying one-and-a-half of Hommel's pages; from Pomponius' are 37 occupying four pages; from Paul's are 190 occupying 22 pages, this work of Paul's being one of the larger components of the Digest. The various treatises on Plautius were dealt with together by the Edictal Com-

mittee immediately after the works on the Edicts, Paul's being taken first as the latest and largest. In some extracts from it (D. III. 3. 1 61; XX. 4. 1 13; XXXIV. 2. 1 8; XXXV. 1. 1 43; 1 44; 2. 1 49) part is stated to be Plautius' text, part to be Paul's note; and as Plautius refers to Cassius, Nerva, Proculus, and Atilicinus we get a superior limit for the time of his writing, Javolen and Neratius giving the inferior limit. His time will be about Vespasian, or at any rate towards the end of the first century *p. Chr.* Ulpian in his 17th book *ad Sabinum* uses the expression *omnes auctores apud Plautium de hoc consenserunt* (Vat. Fr. 77) which points to the work having been so edited as to make it a collection of various opinions.

CELSUS *pater* is mentioned by Pomponius as the successor of Pegasus in the leadership of the school started by Labeo, and as himself succeeded by his more distinguished son. His opinions are quoted by his son D. XII. 4. 1 3. § 7; XXXI. 1 20; 1 29. Neratius says *et Aristoni et Celso patri placuit*, &c. (D. XVII. 1. 1 39). Where Celsus is named without the addition of *pater* it is generally assumed that the son is meant. The last quarter of the 1st century is the time to which the father must be assigned. In XXXI. 1 29 he is said to have been in the council of the consul *Ducennius Uerus*, but this consulship is wholly unknown. (C. Ducenius Proculus was *consul suffectus* A.D. 87, as we learn from the *Acta Arualia*.)

PEDIUS, whose name is given as *Sextus Pedius* (D. IV. 8. 1 32. § 20; IX. 2. 1 33; XXXIX. 1 5. § 9), was later than Ofilius and Sabinus (D. XIV. 1. 1 1. § 9; L. 16. 1 13. § 1), but apparently earlier than Pomponius (D. IV. 3. 1 1. § 4); the inference commonly taken from III. 5. 1 6 that he was earlier than Julian being displaced by Mommsen's making 1 6 continuous with 1 5). He wrote on the Edict in at least 25 books (D. XXXVII. 1. 1 6 § 2), and on Stipulations in more than one book (D. XII. 1. 1 6). He is often (54 times) quoted by Paul and Ulpian and by them only (see above and VI. 1. 1 6; XXI. 1. 1 4. § 4; 1 23. § 9; XLIII. 17. 1 1. § 4; 19. 1 1. § 7; 24. 1 1. § 6; cf. Vat. Fr. 93). There are no extracts in the Digest. In the abbreviations given in *Cod. Einsidl.* (Keil's *Gram.* IV. p. 328; Huschke *Iur. Anteiust.* p. 143, ed. 4) *S. P. M.* is interpreted *Sextii Pedii Mediuani*. (I see however no other jurist so denoted in these notes by initials.)

Ulpianus is cited 16 times in the Digest, but there are no extracts from his writings. He reported opinions of Sabinus, Cassius,

and Proculus (D. xxix. 7. 1 14); and his opinion was referred to by Pomponius (D. xiii. 6. 1 17. § 4); but there is no further indication of the time at which he wrote. His opinions are cited by Scaevola xxix. 7. 1 14; by Ulpian in his works on the Edicts D. iv. 2. 1 14. § 5; 8. 1 21. § 11; ix. 2. 1 27. § 24; xix. 5. 1 17; xxi. 1. 1 1. §§ 9, 10; 1 17. §§ 3, 5; xxxix. 2. 1 24. § 9; xlvi. 16. 1 1. §§ 41—46; 19. 1 1. § 6; by Paulus, D. iv. 9. 1 4. § 2; xiii. *l. c.*; xix. 4. 1 1. § 3. In *Collat.* xii. 7. § 8 we have *Item libro vi. ex Uiuiano relatum est, si furnus, &c.*, which reference is omitted in transferring the passage to D. ix. 2. 1 27. § 10 (see above p. lxx).

FUFIDIUS wrote *Quaestiones*, from the second book of which African quotes in D. xxxiv. 2. 1 15. Fufidius there reports an opinion of Atilicinus. Gaius (D. xl. 2. 1 25) contrasts the opinions of Fufidius and Nerva the younger. Paul refers to Fufidius in D. xlii. 5. 1 29. (Cujas suggested his identification with L. Fufidius, an advocate mentioned by Cic. *Brut.* 29. § 112; Plin. *H. N.* xxxiii. § 21; others of the name are mentioned Cic. *Pis.* 35; *Fam.* xiii. 11, 12; *Q. Fr.* iii. 1, 2; Hor. *Sat.* i. 2. 12, but they are all inconsistent with the Digest.)

CAMPANUS is twice mentioned, in both cases by writers on trusts, viz. by Valens D. xxxviii. 1. 1 47; by Pomponius xl. 5. 1 34. § 1.

PUTEOLANUS *libro primo adsectoriorum scribit* D. ii. 14. 1 12 (Ulp.). Nothing more is known of him or his work.

OCTAUEUS is quoted by Valens (D. xxxvi. 1. 1 69. (67.) pr.); by Terentius Clemens (xl. 9. 1 32), by Pomponius (xix. 1. 1 55; xxx. 19; xl. 1. 1 13; 4. 1 61. § 2; 5. 1 20 *bellissime Aristo et Octaueus putabant*); by Marcian (xx. 3. 1 1. § 2); often by Paulus (e.g. vi. 1. 1 6; xviii. 6. 1 8 *Proculus et Octaueus aiunt*); and Ulpian (e.g. v. 2. 1 16; 1. 18; vii. 8. 1 12. § 6). He wrote after the *lex Iunia Norbana*, which was passed 19 *p. Chr.* (Dosith. 2). There are no extracts from him in the Digest.

UARIUS LUCULLUS is referred to by Aristo in an extract from Pomponius (D. xli. 1. 1 19). Mommsen conjectures *Varius* to be a mistake for *Uarro*; and for *Lucullus* refers to C. *Tull.* 4. § 8 *M. Lucullus, qui summa aequitate et sapientia ius dixit primus hoc iudicium, composuit*. If this was the Lucullus meant, one would have expected Pomponius (who wrote on Aristo) to have named him in his list of the lawyers.



SERUIIUS is stated by Terentius Clemens (D. xxxvii. 14. l 10) to have reported an opinion of Proculus.

ARISTO, often quoted (80 times) in the Digest, is no doubt the same as Titius Aristo, a friend of Pliny the younger, who addresses two letters to him (v. 3; viii. 14). He attended Cassius' lectures (D. iv. 8. l 10); was with Neratius Priscus in the Council of Trajan (D. xxxvii. 12. l 5); and was so ill A.D. 97, that he requested Pliny and other friends to ascertain from the physicians whether his disease was incurable, in order that he might in that case adopt a voluntary death (Plin. *Ep.* i. 22). The doctors gave a favourable prognostic; and Aristo was still alive in the consulship of Afranius Dexter, i.e. A.D. 105 (ib. viii. 14. § 12). Pliny speaks of him in terms of warm praise: *Nihil illo gravius, sanctius, doctius, ut mihi non unus homo sed literae ipsae omnesque bonae artes in uno homine summum periculum adire uideantur. Quam peritus ille et priuati iuris et publici! Quantum rerum, quantum exemplorum, quantum antiquitatis tenet! Nihil est quod discere uelis, quod ille docere non possit.... In toga negotiisque uersatur, multos aduocatione plures consilio iuuat. Nemini tamen istorum (i.e. philosophers) castitate, pietate, iustitia, fortitudine etiam primo loco cesserit* (ib. i. 22).

There are no extracts from him in the Digest, but he is frequently referred to. He often gave answers on points of law. Thus answers to Celsus are named (D. ii. 14. 17. § 2; xl. 7. l 29. § 1); to Neratius Priscus (xx. 3. l 3; cf. xl. 4. l 46); and also of Neratius to him (xix. 2. l 19. § 2); and of Aristo to others (viii. 5. l 8. § 5; xxxvi. 1. l 3. § 2). He wrote notes on Labeo's *posteriores* (D. xxviii. 5. l 17. § 5); on Sabinus (vii. 8. l 6); on Sabinus' books *ad Uitellium* (xxxiii. 9. l 3. § 1); on Cassius (vii. 1. l 7. § 3; l 17. § 1; xxxix. 2. l 28); and apparently made a collection of decisions (*Aristo in decretis Frontianis ita refert*, D. xxix. 2. l 99, which Rudorff (*R. G.* i. p. 184) and Mommsen suppose to refer to decisions on appeal given by Frontinus, who was several times consul). Gellius says that he read in a book of Aristo the jurisconsult *haudquaquam indocti uiri*, that the Egyptians regarded thefts as lawful and did not punish them. Neratius in his *Membranae* often reports Aristo's opinions (D. ii. 14. l 58; xiii. 1. l 12. § 2; xvii. 1. l 39; xviii. 3. l 5; xxxvi. 3. l 13); and hence probably it comes that their two opinions are so often cited together (e.g. vii. 2. l 3. § 2 (= Vat. Fr. 83); xvii. 2. l 62; xxiii. 3. l 20; &c.). Further Pomponius frequently refers to Aristo, and as

Mommsen thinks from the words of Paul (D. xxiv. 3. 1 44. pr. *ut est relatum apud Sextum Pomponium digestorum ab Aristone libro quinto*) collected and edited Aristo's writings and opinions. The words however seem more naturally to denote a work by Aristo which Pomponius quoted. Vat. Fr. 88, 199 also refer to Aristo. The letter from Salvius Aristo to Julian (D. xxxvii. 5. 1 6) can hardly refer to our Aristo, who must have been old when Julian was a youth. See Mommsen *Z. R. G.* vii. 474 sqq. and his Index to Keil's Pliny s. v.

AULUS, named beside Aristo in D. xxviii. 5. 1 17. § 5, is not otherwise known.

## CHAPTER XII.

### JURISTS OF FIRST HALF OF SECOND CENTURY.

MINICIUS wrote some work which Julian edited and annotated in six books. In the Florentine Index Julian's six books *ad Minicium* are named. The inscriptions of the extracts, of which there are 40 in the Digest, occupying  $3\frac{1}{2}$  of Hommel's pages, have *ex Minicio*, except III. 3. 1 70, which has *ad Minicium*. In two places, VI. 1. 1 61; XXXIII. 3. 1 1, Julian's note is expressly distinguished: and so in a citation in XIX. 1. 1 11. § 15, where *libro decimo apud Minicium* is probably a mistake for some other book (x. for v.?). In two extracts we have *Iulianus respondit* (III. 3. 1 76; XLVI. 8. 1 23). Minicius is referred to D. xix. 1. 1 6. § 4.

He is generally identified with the Minicius Natalis to whom Trajan addressed a rescript, allowing matters affecting military discipline, and among them the hearing of prisoners (*custodiarum cognitio*), to be dealt with on holidays. The rescript is given in an extract from Ulpian's 7th book *de officio proconsulis* (D. II. 12. 1 9). This Minicius Natalis is no doubt the elder of the two mentioned in several inscriptions, from which it is seen that he was consul A.D. 107 and proconsul of Africa, with his son serving under him as legate (*C. I. L.* II. 4509, Wilmanns 1172; VIII. 2478; 4676; x. 5670. For the son see II. 4510, 4511; VIII. 4643; Wilmanns 1179.) Minicius Natalis is also mentioned in inscriptions *Eph. Epig.* I. p. 251; IV. p. 271. The full name of both was *L. Minicius L. F. Gal(lus) Natalis Quadronius Uerus*.

A letter of Pliny *Minicio suo* (VII. 12) is by some supposed to be addressed to the lawyer.

LAELIUS. A jurist of this name is mentioned by Paul twice, D. v. 3. l 43 ; and 4. l 3. In the latter place Laelius is said to have mentioned his being present when a woman of Alexandria was brought to Hadrian, who had been delivered of four children at once and a fifth forty days after ; cf. D. xxxv. 4. l 7 (Gai.). Gellius (xv. 27) gives three extracts from the first book of Laelius Felix *ad Q. Mucium* relating to the *comitia* and in one referring to Labeo. Macrob. (*Sat.* i. 6. § 13) gives a quotation from M. Laelius Augur which Huschke doubtfully refers to Laelius Felix. In Plin. (*H. N.* xiv. 93) the editors read *L. Aelius*.

UALERIUS SEUERUS is quoted by Julian (D. iii. 5. l 29. (30.) *respondit U. S.*) and by Ulpian iii. 3. l 8. pr. ; xliii. 20. l 1. § 21 ; and probably ii. 4. l 4. § 3 (*ut Seuerus dicebat*). A *C. Ualerius Seuerus* was *consul suffectus* A.D. 124 (*Corp. I. L.* iii. p. 873).

NERATIUS PRISCUS lived in the reigns of Trajan and Hadrian. He was consul with Annius Verus, when a senate's decree was passed imposing the forfeiture of half his property on any one who castrated his slave (D. xlviii. 8. l 6). The consulship is put in A.D. 83 by Borghesi, in 98 by Asbach (see Teuffel p. 794 n. 4). He was one of Trajan's council with Aristo, when he decided that a father, who had on account of his illtreatment of his son been compelled to emancipate him, could not claim as manumissor the succession (*bonor. poss.*) of his son (D. xxxvii. 12. l 5) ; and he was with Celsus and Julian one of Hadrian's council (Spart. *Hadr.* 18). His position was so high that many thought Trajan intended to leave him, and not Hadrian, as his successor ; and friends so strongly recommended him that one day Trajan said to Priscus *commendo tibi prouincias, si quid mihi fatale contigerit* (ib. 4. § 8). The offices which he held are enumerated in an inscription found at Saepinum, a municipal town in Samnium : *L. Neratio L. f. Uol. Prisco, Praef. Aer. Sat. Cos. Leg. Pr. Pr. in prou. Pannonia scribae quaestori et munere functi patrono* (Wilm. No. 1152) ; i e. 'erected by the quaestorial clerks, present and past, to their patron, Lucius Neratius Priscus, son of Lucius, of the Voltinian tribe, praefect of the treasury of Saturn' (see note on *fisco*, p. 184), 'consul, legate, pro-praetor' in the province of Pannonia'. Mommsen (Index to Keil's *Pliny*) identifies him also with the Priscus to whom A.D. 98 Pliny writes (*Ep.* ii. 13)

<sup>1</sup> This is the official title of the governor of one of the minor imperial provinces.



and addresses as ruling a large army; and perhaps with the Priscus of *Ep.* vi. 8; vii. 8; 19; and vii. 15. (His brother Neratius Marcellus (D. xxxiii. 7. 1 12. § 43) was also consul, and, in Trajan's reign, legate in Britain. Hadrian forced him to kill himself, *Spart. Hadr.* 15.)

His works named in the Florentine Index are *Regulae* in 15 books; *Membranae* in 7 books, and *Responsa* in 3 books. From these there are in the Digest 64 extracts, usually short, so that they do not occupy more than  $7\frac{1}{2}$  of Hommel's pages, out of which the extracts from the *membranae* fill 6. His *libri ex Plautio* are mentioned in the Digest (xxxiii. 7. 1 12. § 35). He is frequently cited, both in the Digest (128 times) and elsewhere (Vat. Fr. 54; 71; 75; 79—85; *Collat.* xii. 7. § 7). A letter to Aristo is referred to in D. xix. 2. 1 19. § 2. Some extracts in the Digest are made either from an edition of some of his writings or from a commentary by Paul (4 books). See D. vii. 8. 1 23; xv. 1. 1 56; xvii. 1. 1 61; xxiv. 1. 1 63, &c. Gellius (iv. 4) speaks of a book *de Nuptiis* which may have been part of one of his more general works.

IAUOLENUS PRISCUS. Little is known of the life of this lawyer. A statement by Pomponius, one extract in the Digest, and one letter of Pliny contains all our direct information. Julian (D. xl. 2. 1 5) tells us that he remembered his teacher Javolenus both in Africa and Syria, when holding a council to approve manumissions (cf. Ulp. i. § 12 sq.), setting some of his own slaves free, and that he himself when praetor and consul followed the precedent (D. xl. 2. 1 5). What magistracy Javolen held is not told us. Pliny (A.D. 106 or 107) tells a good story of Passennus Paulus, who, having collected some friends to hear him read some elegiac verses, began by addressing Javolenus Priscus, *Prisce iubes*. Whereupon Javolen who probably had little taste for recitations, and as a lawyer was not going to take the responsibility thus thrown on him (cf. *fideiubere*, *actio quod iussu*, &c.) could not resist saying, *Ego uero non iubeo*. The reply was received with general laughter and joking, partly we may suppose at the poet, and partly at the candid and facetious lawyer. The courteous Pliny was shocked, and apologises for Javolen. 'He was 'no doubt somewhat cracked, but still he took part in social duties, 'was a member of councils, and even acted publicly as a legal adviser.' (*Est omnino Priscus dubiae sanitatis, interest tamen officiis, adhibetur consiliis atque etiam ius civile publice respondet.* Plin. *Ep.*

vi. 15.) It is not necessary to think Javolen was more than a humourist. Pomponius (D. i. 2. 1 2. § 53) classes him with the Sabinians and says that he succeeded Caelius Sabinus, who flourished in the time of Vespasian, and was himself followed by Aburnius Valens, Tuscianus and Salvius Julianus: so that he evidently belonged to the reigns of Domitian and Trajan. Capitolinus (*Ant. P.* 12) speaks of Diavolenus or Javolenus, along with Vindius, Valens, Maecianus and Ulpius Marcellus, as one of Antoninus' counsellors, but this is discredited by Zimmern, Mommsen (Index to Keil's *Pliny*), and others, the lateness of the time and the fact that he is not named as one of Hadrian's councillors making it improbable.

In the Digest there are 206 extracts, occupying 23 of Hommel's pages. Three works are named in the Florentine Index. 15 books *Ex Cassio* (5½ pages of Hommel); 14 books of Epistles (9 pages of Hommel); and 5 books *ad Plautium* (1½ pages of Hommel). Besides these there are a number of extracts (occupying 7 of Hommel's pages) from a book called *Ex posterioribus Labeonis*, which is classed by Bluhme as the last in the Sabinian series, whereas Javolen's other works are in the Edictal series. The precise relation of this work to *Labeonis libri x posteriorum a Iauoleno epitomatorum*, which is named in the Florentine Index and is one of the books in the Appendix to the Papinian series, is a riddle. Notice especially that extracts from these works alternate in D. xviii. 1. 11 77—80, xix. 2. 11 57—60, and that the same case is differently reported in D. xxiii. 3. 1 80 and 1 83. (See Pernice's discussion *Labeo* i. pp. 69—81. He holds the two works to be different and not, as some have suggested, the same work differently named.) Javolen is not often cited by other writers. Where *Priscus* is cited in the Digest, it is generally thought that Javolen, and not Neratius, is meant. One of the supports of this conclusion is however removed by Mommsen's reading *Proculus et Neratius* instead of *Priscus et N.* in D. vii. 8. 1 10. § 2.

Javolen's style may be seen in the longer extracts such as D. xvii. 1. 1 36; xxxv. 1. 1 40; xl. 7. 1 39; xli. 3. 1 23; xlii. 5. 1 28. He, or rather Labeo, frequently quotes the opinions of the earlier lawyers Q. Mucius, Gallus (Aquilus), Servius, Ofilius, Trebatius, Tubero, Cascellius, Namusa.

CELSUS, i.e. P. IUVENTIUS CELSUS, son of another lawyer of the same name, is often called *Celsus filius*, but is also the lawyer meant

when Celsus only is named. His full name is given in a *S. Cons.* quoted in D. v. 3. 1 20. § 6 as *P. Iuuentius Celsus Titius Aufidius Oenus Seuerianus* (where Borghesi reads *Titus* and *Hoenius*). Little is known of his life. He was A.D. 94 engaged in a conspiracy against Domitian, and to avoid conviction requested a private interview with the Emperor, in which he knelt to him, called him master and god<sup>1</sup>, and proceeded to deny the charge, and to promise that if he were let off he would turn informer against others. He was set free, but accused no one, excusing himself on one pretext after another, until Domitian was killed (Dio Cass. LXVII. 13). In 106—107 he was praetor and (according to Plin. *Ep.* VI. 5; cf. v. 20) took a leading part in an angry discussion in the senate. Varenus a defendant on a charge of extortion had obtained by Pliny's advocacy the consent of the senate to his witnesses being formally summoned (*euocari*), as well as those of the prosecutors. At a subsequent meeting of the senate, Licinius Nepos reopened the matter, blamed the senate, and demanded or ironically suggested that this should be made a standing order for all defendants on a charge of extortion. Celsus defended the senate's action, and with angry invective rebuked Nepos. Both disputants had come prepared for the contest and spoke from written notes. Celsus was consul first with L. Neratius Marcellus and afterwards with Q. Julius Balbus in A.D. 129 (*Corp. I. L.* VI. Nos. 527; 10299; III. pp. 875, 876; D. v. 3. 1 20. § 6) and this is called his second consulship (Cod. VII. 9. 1 3), though nothing is known of his first consulship. An important decree of the senate on Hadrian's proposal was made in this year relative to the sale of the assets of an inheritance (D. I.c.). He is mentioned as being one of Hadrian's legal advisers with Salvius Julianus, Neratius Priscus, and others (Spart. *Hadr.* 18; where the mss. have *Iulium Celsum*). Pomponius names him with Neratius Priscus, as succeeding to his father in the headship of Proculus' school. (D. I. 1. 1 2. § 53.) An inscription in which *Iuuentius Celsus* as pontifex occurs in A.D. 155 can hardly refer to the lawyer (Wilmanns No. 312).

He is considered to have been a man of sharp temper and vigorous expression. His answer when consulted by Domitius Labeo is famous, and *quaestio Domitiana* was used in the middle ages almost proverbially for a foolish question and *responsum Celsinum* for a rude answer. The question was whether one who had been summoned to write a will, and had written and put his seal to it, could be counted

<sup>1</sup> Cf. Suet. *Dom.* 13.



as one of the necessary seven witnesses. To which Celsus replied 'Either I do not understand what it is you consult me about or your question is very foolish. For it is something more than ridiculous to doubt whether a man is a good witness when he has written the 'will itself' (D. xxviii. 1. 1 27 an extract from Celsus' own Digest). Possibly Dom. Labeo's doubt may have arisen from the fact that the witness was not summoned as such but as writer of the will (cf. ib. 1 21. § 2; Cod. vi. 23. 1 31. § 2 *septem testes, quos ad testimonium vocari necesse est*, &c., and Puchta *Curs.* § 99 n). Some other instances of sharp language by Celsus have been noted e.g. *quod totum et ineptum et vitiosum est* D. xxviii. 5. 1 60 (59). § 1; *Quid tam ridiculum est quam?* &c. (D. xlvii. 2. 1 68 (67). § 2); *Celsus adulescens scribit...esse hanc quaestionem de bono et aequo; in quo genere plerumque sub auctoritate iuris scientiae perniciose, inquit, erratur* (Paul. D. xlv. 1. 1 91. § 3), where *adulescens* is noticeable. Again Ulpian D. iii. 5. 1 9 (10). § 1 speaking of an opinion of Antist. Labeo's says *istam sententiam eleganter deridet Celsus*. See also D. xviii. 2. 1 13. pr. and Vat. Fr. 75. § 5 (where however the ms. is somewhat corrupt). But one can hardly lay much stress on a few expressions of this kind. From the way in which his opinion is quoted by subsequent jurists it is clear that he was very highly thought of and in D. iv. 4. 1 3. § 1 we read of his being consulted by a praetor. In D. xxxiii. 10. 1 7 a considerable extract is found, in which Celsus quotes the older jurists Tubero and Servius, and discusses their opinions with deference, while at the same time expressing his own with that almost epigrammatic neatness which the Roman lawyers often called *elegantia*. Many of his views exhibit a reasonable regard to natural circumstances rather than to the precise letter, which is eminently characteristic of the best Roman lawyers, and is quite consistent with sharp logical insight. See e.g. D. viii. 6. 1 6; xii. 6. 1 26. § 12; xxiv. 1. 1 5. § 15; xxviii. 2. 1 13 pr.; xxxi. 1 22; 1 30; &c. A curious statement is quoted from him, that no one is so deaf as not to be able to hear at all, if a person speaks *supra cerebrum illius* (Cod. vi. 22. 1 10. § 3). The only work from which extracts occur in the Digest is his *Digesta* in 39 books. These extracts are 141 in number: they occupy 14 of Hommel's pages. See also Vat. Fr. 75—80 (where he is often referred to) and ib. 1. Besides this work there are cited also his *Epistolae*, at least 11 books (D. iv. 4. 1 3. § 1); his *Quaestiones*, at least 19 books (D. xxxiv. 2. 1 19. § 3) and his *Commentarii*, at least 7 books, which however may have been part of the *Digesta*

(*Celsus libro nono decimo digestorum, commentariorum septimo*, D. xxxiv. 2. 1 19. § 6). There are 54 citations from the *Digesta* and 121 citations from this or other works. Of the citations Pomponius makes 8, Marcianus 4, Paul 4 and Maecianus 1, and Ulpian all the rest.

IULIANUS, i.e. P. SALVIUS IULIANUS, the last name in Pomponius' list of lawyers, was one of those who succeeded Javolenus as leaders of the Sabinian school. He himself calls Javolenus his praeceptor (D. xl. 2. 1 5). He was probably from the colony of Hadrumetum in Africa (at least his son is so described Spart. *Iul.* 1); and was praetor and twice consul. One of these consulships fell in A.D. 148 when C. Bellicius Torquatus is named as his colleague (*Corp. I. L.* vi. No. 375; 3885). Mommsen however attributes this consulship to Julian's son (*Z. R. G.* ix. 88 n. sq.). Julian was *curator aedium sacrarum* in A.D. 150 (*Corp. I. L.* vi. 855), and at one time Prefect of the city (Spart. *Did.* *Iul.* 1). He was in Hadrian's council (Spart. *Had.* 18) and is called *amicus noster* in a rescript of M. Antonius and Verus which, speaking of his opinion in the past tense, seems to imply that he was then dead (D. xxxvii. 14. 1 17). The letters of Fronto and M. Antoninus (pp. 59, 60 ed. Naber) speak of him as in bad health. He was buried five miles from Rome on the *Via Labicana* (Spart. *Did.* *Iul.* 8. § 10).

His son was put to death by Commodus on a charge of conspiracy (Lampr. *Com.* 4; cf. 3). His granddaughter is said by Spartianus (*Did.* *Iul.* 1.) to have been mother of Didius Julianus, who was made emperor in succession to Pertinax. Didius was killed in A.D. 193, at the age of 60 according to Dio, or 56 according to Spartianus. If the lawyer was his great grandfather, he must have been born say 65 years before Didius, i.e. about A.D. 70.

His authority as a lawyer was great. In the reign of Hadrian (A.D. 131 according to Euseb. *Chron.*) he arranged and revised the praetor's edict (*perpetuum composuit edictum* Eutrop. viii. 17; *primus edictum quod uarie inconditeque a praetoribus promebatur in ordinem composuit*, Aurel. Victor *Caes.* 19). A rescript of Leo and Anthemius A.D. 473 says in *praesenti negotio aequitati conuenientem Iuliani tantae existimationis uiri atque disertissimi iuris periti opinionem sequi* (Cod. vi. 61. 1 5). Similarly Justinian A.D. 530 *Papinianus huiusmodi sententiae sublimissimum testem adducit Sabinum Iulianum summae auctoritatis hominem et praetorii edicti ordinatorem* (Cod. iv. 5. 1 10); and again in the Const. *Tanta* (§ 18)

confirming the Digest, *Julianus legum et edicti perpetui suptilissimus conditor*, for which the Greek constitution Δέδωκεν § 18 has ὁ πάντων τῶν ἐν νομοθεσίαις εὐδοκιμηκότων σοφώτατος Ἰουλιανός, and, immediately after, speaks of Hadrian having by means of Julian compressed the annual edicts of the praetors into a small book (ἐν βραχεί τινὶ συνήγε βιβλίῳ). His name is put first of all in the Florentine Index.

Before discussing Julian's revision the general nature of the edict demands attention. An edict is simply a public notice, and a praetor's edict is such a notice issued in his capacity as praetor. Such edicts would often deal merely with the particular matters which happened to require the praetor's action. As the equitable jurisdiction of the praetor grew, it became customary for the praetor on entering into office to give public notice of the rules which he should follow in the administration of justice. Such a general notice was called *edictum perpetuum*, 'a standing notice'<sup>1</sup>, being one not intended for a special case but for the whole course of his year of office. To a great extent it would be taken from his predecessors, and so far it was called *translativum*<sup>2</sup> traditional; but some parts might be recast by the praetor, or new clauses might be added. The issue of such an edict would not exhaust the praetor's authority: additional action or edict might be required by circumstances (cf. D. II. 1. 1 7. pr.), but it is obvious that the very purpose of such a notice would be annulled or impaired, if the praetor did not observe his own edict in the cases to which it applied in principle. Cicero speaks at some length on this subject (B.C. 70) in Act. II. Lib. 1 against Verres, Capp. 40—48, and again in reference to his own edict issued as governor of Cilicia. A provincial edict was partly similar to the urban edict, and often taken from it, though some rules would be required by the special circumstances or customs of the particular province. But the principle was the same. A few passages may be cited. *Posteaquam ius praetorium constitutum est, semper hoc iure usi sumus: si tabulae testamenti non proferrentur, tum uti quemque potissimum heredem esse oporteret, si is intestatus mortuus esset, ita secundum eum possessio daretur. Quare hoc sit*

<sup>1</sup> See a fuller discussion in Prof. Clark's *Practical Jurisprudence*, pp. 208 sqq., 347 sqq.

<sup>2</sup> It was *translatum* so far as actually copied from a predecessor; *translativum* is a secondary formation describing the character thus acquired. So *editi iudices* are judges nominated; *editicii* 'nominative' and were judges taken from *editae tribus* (cf. Cic. *Plane*. 15. § 36).



*uequissimum, facile est dicere, sed in re tam usitata satis est ostendere, omnes antea ita ius dixisse, et hoc uetus edictum translaticiumque esse* (Cic. *Uerr.* Lib. I. 44. § 114). Then speaking of a change made for a particular case Cicero proceeds: *In Sicilia de possessionibus dandis edixit idem quod omnes Romae praeter istum...Quaero cur ea capita in edictum provinciale transferre nolueris...Non enim hoc potest hoc loco dici, multa esse in provinciis aliter edicenda: non de hereditatum quidem possessionibus, non de mulierum hereditatibus. Nam utroque genere uideo non modo ceteros sed te ipsum totidem uerbis edixisse, quot uerbis edici Romae solet* (Ib. 45, 46. §§ 117, 118). Speaking of his own edict B.C. 51 Cicero says that he copied many clauses from Q. Mucius Scaevola's edict for the province of Asia, and then proceeds, *Breue autem edictum est propter hanc meam διαίρεσιν, quod de duobus generibus edicendum putavi, quorum unum est provinciale, in quo est de rationibus ciuitatum, de aere alieno, de usura, de syngraphis, in eodem omnia de publicanis; alterum quod sine edicto satis commode transigi non potest, de hereditatum possessionibus, de bonis possidendis uendendis, magistris faciendis, quae ex edicto et postulari et fieri solent; tertium de reliquo iure dicundo ἀγραφον reliqui: dixi me de eo genere mea decreta ad edicta urbana accommodaturum* (*Att.* VI. 1. § 15). *Romae composui edictum: nihil addidi, nisi quod publicani me rogarunt, cum Samum ad me uenissent, ut de tuo (i.e. his predecessor Appius) edicto totidem uerbis transferrem in meum. Diligentissime scriptum caput est quod pertinet ad minuendos sumptus ciuitatum: quo in capite sunt quaedam noua, salutaria ciuitatibus... hoc uero, ex quo suspicio nata est, translaticium est* (*Fam.* III. 8. § 4). C. Cornelius in B.C. 67 carried a law, *ut praetores ex edictis suis perpetuis ius dicerent* (*Ascon. in Corn.* p. 58), possibly in consequence of Verres' practices.

What precisely Julian did, when he *edictum perpetuum composuit*, we are not told. *Componere* was used by Cicero to describe drawing up his own edict. Pomponius (D. I. 2. 1 2. § 44), in speaking of Ofilius' numerous legal works, says *de iurisdictione edictum praetoris primus diligenter composuit* (see above, p. cxv). Ofilius was not praetor, but the word describes the ordinary work of the praetor. As such we may fairly suppose Julian's work to have been, though very likely more thorough, and under the imperial auspices certainly more permanent. The predominance of the imperial power would naturally throw the praetor's initiative into the shade, and inferior importance would bring about neglect. So that in course of time

some remodelling would be very desirable. Julian may have improved the form, rearranged the matter and incorporated some amendments, but substantially the rules of law would not be altered. One innovation is mentioned by Marcellus (D. xxxvii. 8. 1 3, cf. 9. 1 1. § 13). By a new clause introduced by Julian an emancipated son passed over by his father's will does not on obtaining *bonorum possessio* exclude sons of his own still in their grandfather's power, but shares it with them, bringing his own property into hotchpot. Other amendments of Julian's are supposed to be referred to in D. iv. 2. 1 1; XLIII. 19. 1 4. The great difference however between Julian's edict and those of preceding praetors was in the authority which it obtained. Theirs lasted for their year of office and no more. *Qui plurimum tribuunt edicto praetoris, edictum legem annuam dicunt esse* (Cic. *Verr.* Lib. II. 42. § 109). Julian's was confirmed by a *S. Consultum* (Const. *Tanta* § 18), introduced by a speech from Hadrian (Const. *ἔδωκεν* § 18)<sup>1</sup> who declared that any point which should arise, not provided for in the edict, should be decided in analogy with it. After this the standing edict (*edictum perpetuum*) referred to was Julian's (D. xxxi. 1 77. § 29; XLIX. 14. 1 1. § 1; Vat. Fr. § 317; Cod. II. 1. 1 3; iv. 26. 1 2, &c.). Sometimes it is called *praetoris edictum* (D. xxiii. 2. 1 58), or simply *edictum* (D. xxxvi. 3 1 5. § 1). See Rudorff *Z. R. G.* III. pp. 28, 29; *Rechts-Gesch.* i. § 97.

We read of the Edict of the *Praetor urbanus*, of the Edict of the *Praetor Peregrinus* (cf. *Lex Rubria* 20), of the Edict of the Province of Asia, of Sicily, of Cilicia, &c., and of the Edict of the Curule Aediles, all in the sense of standing codes of rules promulgated for the several magistrates' period of office. (*Ius edicendi habent magistratus populi Romani, sed amplissimum ius est in edictis duorum praetorum urbani et peregrini, quorum in provinciis iurisdictionem praesides earum habent; item in edictis aedilium curulium, quorum iurisdictionem in provinciis populi Romani quaestores habent; nam in provincias Caesaris omnino quaestores non mittuntur et ob id hoc edictum in his provinciis non proponitur*, Gai. i. 6.) Whether Julian made one edict out of all these edicts (Rudorff *Z. R. G.* III. p. 21), or revised separately the city, foreign, provincial and aediles'

<sup>1</sup> One would have liked earlier authority. It is curious that the one constitution speaks only of the speech, the other only of the *S. C.* A notice in a Greek Epitome, A.D. 920 (appended to Zachariae *Proch. Nom.* p. 292), that the revision of the edict was intrusted to Julian and Servius Cornelius is, I think with others, of no historical value (Rudorff accepts it, *Rechts-Gesch.* i. p. 268). The 'Servius' is from D. i. 2. 1 2. § 44; for 'Cornelius' see perhaps above, p. cxiii.

edicts, or dealt only with the city praetor's edict, which was as it were the leading authority, we do not know, but the last seems improbable, and the two first suppositions may be only formally different. Gaius commented on the *edictum urbicum* and *edictum provinciale* (see below, p. clxxviii); Ulpian and Paulus on the *edictum* (simply), and also on the *edictum aedilium curulium*. No fragments remain of the *edictum praetoris peregrini* (Mommson *Staatsrecht* II. p. 212, ed. 2; cf. Clark *Pract. Jur.* p. 350).

There is no need to suppose that the praetors after Julian issued no edicts of their own. Gaius' words speak of the power as in operation. But subsequent praetors would act rather by way of interpretation and prescribing subordinate details, than in the quasi-legislative capacity which was the attribute of their office before (cf. Walter *Rechts-Gesch.* II. § 440). Imperial rescripts filled the place of the praetors' previous action.

The principal work of Julian, from which extracts have been taken into the Digest, is called by the same name *Digesta*. This work is the first of all named in the Florentine Index. Fitting (*Aller der röm. Juristen*, p. 6) shews that the sixth book was written before the *Sc. Iuuentianum* (14 March, 129 pr. Chr.): else Julian would have been cited in reference to it (D. v. 3. 1 20); and that the 64th book contained a reference to a rescript of Antoninus Pius (D. iv. 2. 1 18); so that the bulk of the work was written in the reigns of Hadrian and the first Antonine. Mommson (*Z. R. G.* ix. 94) from the character and phraseology (*respondi, respondit, &c.*) of the extracts infers that the *Digesta* was an orderly arrangement under certain heads of a number of questions with detailed explanations as given in lectures. The order of the edict appears to have been followed (see however Lenel *Ed. Perp.* p. 7) as far as the 58th book. After that the matter appears miscellaneous. Marcellus wrote notes on it, which are often given with the text in the extract in the Digest e.g. iv. 6. 1 41; v. 1. 1 75; xv. 1. 1 16; xxiii. 3. 1 44. § 1; xxx. 1 82. § 3; 1 92. pr.; xxxvi. 1. 1 28. (27). Notes of Scaevola (e.g. ii. 14. 1 54; xviii. 6. 1 10. § 1); and of Paulus (e.g. iv. 2. 1 11; xviii. 5. 1 4) are found as separate extracts. Ulpian (but no one else before his time) quotes Julian's Digest profusely. The extracts from it in Justinian's Digest are stated to be 376 in number: they occupy 58 of Hommel's pages. Citations (in extracts from other writers) occupy about 17 pages more. Besides these there are no less than 620 other citations of Julian where the work is not



expressly named. No doubt these are, at least mainly, from the *Digesta*.

Three other works of Julian are named in the Florentine Index, viz. 6 books *ad Minicium* (or *ex Minicio*), 4 books *ad Urseium Ferozem* (which were probably annotated editions of those authors), and one book *de ambiguitatibus*. Extracts from these occupy 9 or 10 pages.

The total number of extracts from works bearing Julian's name is 456, occupying 68 of Hommel's pages. Some extracts of considerable length form D. xxx. l 81—l 104 (with some interruptions); xxxvi. l. l 28. (27); xli. 3. l 33; 4. l 7; xlvi. 3. l 34; 8. l 22; &c. In D. xxxiv. 5. l 13. (14) we have a discussion of the ambiguities in the use of disjunctives.

UALENS, whose full name is given as *Aburnius Ualens* D. i. 2. l 2. § 53; and iv. 4. l 33; and xxxii. l 78. § 6, is named by Pomponius as successor with Tuscianus, a jurist otherwise unknown, to Javolen. One work of his *de fideicommissis* in 7 books is named in the Florentine Index, and furnishes 19 extracts to the Digest. He cites answers of Javolen (D. xxxiii. l. l 15) and Julian (D. iv. 4. l 33). He is quoted three times by Paul D. xxxi. l 82. § 2; xxxii. l 78. § 6; xl. 5. l 25. Hence he probably wrote under Hadrian or Anton. Pius. A lawyer named Salvius Valens is said by Capitolinus (*Pius* 12) to have been in the council of Ant. Pius with Vindius Verus, Volusius Maecianus, Ulpius Marcellus and Diavolenus. A rescript of Pius to him is mentioned in D. xlviii. 2. l 7. § 2. It is possible this may be the same as Aburnius Valens. Mommsen reads Fulvius for Salvius on the strength of an inscription (Orelli 3153) which at Viertel's suggestion (*de uitis iurisconsultorum* p. 30) he refers to our jurist. Mommsen gives it as follows: *L. Fulvio C. fil. Popin. (write Pupinia) Aburnio Ualenti pontifici praefect(o) urbi feriarum Latinar(um) facto ab Hadriano II cos. (i.e. 118 p. Chr.) III uiro a(uro) a(rgento) a(ere) f(lando) f(eriundo) quaest(ori) Aug(usti) tribuno plebis designato candidato Aug(usti) eq(uo) publ(ico)<sup>1</sup>. c(larissimo) i(uueni) d(ecreto) d(ecurionum)*. This nominal praefecture of the city was often given to young men of rank, and hence we may infer that Valens was born in A.D. 100 (Mommsen *Z. R. G.* ix. p. 90).

<sup>1</sup> *Equo publico*, as abl. of description, is common in imperial inscriptions (see Wilmanns ii. p. 540) to denote a member of the six *turmae* instituted by Augustus (cf. Madvig *Verfass.* i. p. 177; Hirschfeld *Untersuch.* p. 244: etc.).

A short extract from the '7th book *Actionum*' is given in D. xxxvi. 4. 1 15 inscribed with Valens' name. Krüger suggests that this is a mistake for Venuleius.

The extracts fill about 3 of Hommel's pages. Of the longer extracts are xxxiv. 1. 1 22; xxxv. 1. 1 89; xxxvi. 1. 1 69. (67).

UINDIUS is mentioned only a few times in the Digest, viz. by Paul (D. II. 9. 1 2 *Uindius putat* and *ut Pomponius et Uindius scribunt*); by Ulpian (II. 14. 1 7. § 18 *Uindius scribit*; v. 1. 1 5 *ut et Pomponius et Uindius scripserunt*); and by Maecianus (xxxv. 2. 1 32. § 4 *Uindius noster ait*). In Vat. Fr. 77 we find him contemporary with Julian, *Uindius* (*Uenidius* MS.) *tamen, dum consulit Iulianum, in ea opinione est, &c.* He is no doubt the Vindius Verus who was in the council of T. Antoninus Pius, and the M. Vindius Verus who was consul with Pactumeius Clemens 16 June 138 p. Chr. (*C. I. L.* III. p. 879).

PACTUMEIUS CLEMENS is mentioned once in the Digest by Pomponius (D. XL. 7. 1 21. § 1) *Pactumeius Clemens aiebat...imperatorem Antoninum constituisse.* Antoninus Pius no doubt was meant, for Pactumeius was consul with Vindius in the year 138 p. Chr. (*Corp. I. L.* III. p. 879 where he is called *C. Pactumeius Clemens*). An inscription at Cirta (the modern Constantine in Algiers) calls him a jurisconsult and gives a full list of the official positions he had held (Wilmanns 1180) *P.<sup>1</sup> Pactumeio P. F. Quir. Clementi x uirum stlitibus iudicand. quaest. leg. Rosiani Gemini soceri sui procos. in Achaia trib. pleb. fetiali legato Diui Hadriani Athenis Thespiis Plateis item in Thessalia praetori urbano legato Diui Hadriani ad rationes ciuitatum Syriae putandas legato eiusdem in Cilicia consuli legato in Cilicia Imp. Antonini Aug. leg. Rosiani Gemini procos. in Africa iuris consulto patrono IIII coloniarum DD. PP.<sup>2</sup>* 'Erected by a decree of the decemvirs at public cost to P. Pactumeius Clemens, son of Publius, of the Quirinian tribe, one of the ten commissioners for deciding suits, quaestor, legate of Rosianus Geminus' (cf. D. XLVIII. 5. 1 6. § 2; 6. 1 6) his father-in-law when proconsul 'in Achaia, tribune of the commons, fetial, legate of the divine Hadrian at Athens, Thespieae, Platea and likewise in Thessaly, praetor of the city, legate of the divine Hadrian to settle the

<sup>1</sup> Probably P is a mistake for C. Klein (*Fast. Cons.* p. 67) corrects C in the other inscription.

<sup>2</sup> *decurionum decreto pecunia publica.*

‘finances of the towns of Syria (cf. Spart. *Had.* 11), legate of the ‘same (Hadrian) in Cilicia, consul, legate in Cilicia of the Emperor ‘Antoninus (Pius) Augustus, legate of Rosianus Geminus when ‘proconsul in Africa, juriconsult, patron of four colonies’. He was evidently made consul just at the time of Hadrian’s death, perhaps in his absence on the duty in Cilicia, to which he was first appointed by Hadrian, afterwards reappointed or continued by Antonine (cf. Mommsen *Mon. Ancy.* p. 179, ed. 2).

AFRICANUS, whom we can hardly be wrong in identifying with the *Sextus Caecilius Africanus* mentioned in D. xxv. 3. 1 3. § 4 as consulting Julian, is named in the Florentine Index as the author of *Quaestiones* in 9 books. He is quoted by Paul (D. xix. 1. 1 45. pr. *idque et Iulianum agitasse Africanus refert*), and by Ulpian (xxx. 1 39. pr. *Africanus libro vicesimo epistularum apud Iulianum quaesit*, and xxxviii. 17. 1 2. § 8 *Africanus et Publicius temptant*). There are in the Digest 131 extracts from the *Quaestiones*. They fill 23½ of Hommel’s pages. Fitting concludes that the work was written at the end of Hadrian’s or beginning of Ant. Pius’ reign. The difficulty of many of the extracts has made *Africani lex* a synonym for a difficult passage. Cujas commented on the whole of them (Tom. iv. ed. 1837 Prati).

Gellius (xx. 1) speaks of Sextus Caecilius as holding a discussion in his presence with Favorinus on the law of the Twelve Tables. He is described as *in disciplina iuris atque in legibus populi Romani noscendis interpretandisque scientia usus auctoritateque inlustris*, and Gellius gives us his defence of the early procedure authorised by the Twelve Tables, especially of the famous law *si plus minusue secuerunt, se fraude esto*.

Justinian (Cod. vii. 7. § 1 a) calls Sex. Caecilius *iuris antiqui conditor*. And Sex. Caecilius is referred to in several places in the Digest, viz. xxi. 1. 1 2; xxxiii. 9. 1 3. § 9; xxxv. 1. 1 71. pr.; xi. 9. 1 12. § 2; xlviii. 5. 1 14. (13). § 1. Further the Digest in not a few places contains mention of the opinion of *Caecilius*; xv. 2. 1 1. § 7; xxi. 1. 1 14. § 10; xxiv. 1. 1 64; xxxv. 2. 1 36. § 4; xlviii. 5. 1 28. (27). § 5.

On the whole there seems no reason to doubt that the Sex. Caecilius of Gellius and the Sex Caecilius and Caecilius of the Code and Digest are the same as Africanus: but in two of these passages the text is almost certainly wrong (Mommsen l. c.). Thus *Caelius*



should be written in XXI. 1. 1 14. § 10 (cf. 1 14. § 3; 1 17 *passim*; 1 38. § 7; § 11; 1 65. § 2); and *Sex. Aelius* should be written in XXXIII. 9. 1 3. § 9 (cf. Gell. iv. 1. § 20). In XXIV. 1. 1 64 Javolen cites an opinion of Proculus and Caecilius which cannot refer to Africanus, who was much later than Javolen. Probably *Caecilius* is a corruption for *Caelius*.

Possibly Africanus is meant by Gaius II. 218 *Iuliano et Sexto placuit* (see p. clxxii). That African stood in close relation to Julian is tolerably clear. The Greek scholiasts in several places refer to Julian's opinions, given in the extracts from African by the simple word *respondit* (cf. *Aegid. Menagii Praef. ad Cuiac. in Africanum*; Mommsen *Z. R. G.* ix. 93). Mommsen suggests that probably African's *Quaestiones* was an account of Julian's opinions and discussions with his pupils. A similar view is taken by H. Buhl *Z. R. G.* xv. pp. 191 sqq. See also Schulin *ad Pomp. de origine iuris*, p. 15.

Some of the longer extracts from African are xv. 1. 1 38; xvi. 1. 1 19; xxx. 1 108; xxxv. 2. 1 88; xlvi. 1. 1 21; 3. 1 38; xlvii. 2. 1 61.

POMPONIUS, i.e. SEXTUS POMPONIUS, is a lawyer of whom we know nothing except what may be gathered from the extracts in the Digest, and from references to him by later jurists. From the expressions which he uses he is supposed to have been a pupil of Pegasus (D. xxxi. 43. § 2 *Pegasus solitus fuerat distinguere*), of Aristo (e.g. D. xxxvi. 1. 1 74. (72) *Aristo aiebat*; xl. 5. 20) and of Octavenuus (ib. &c.). Fitting gives the following times for the composition of his various works. His Commentary on Sabinus in 35 books, and perhaps his *Fideicommissa* in 5 books were written in Hadrian's reign and before Julian. The Handbook (*Enchiridion* in one book or according to the Florentine Index in two books), from which the long historical extract which forms D. i. 2. 1 2 was taken, ends with the name of Julian, and was therefore written about the same time. To the reign of Ant. Pius belong his commentary on Q. Mucius in 39 books, his 5 books of *Senatus Consulta* (though they may be earlier), his book of Rules (*Regularum*), his Commentary on the Edict, from which we have no extract but of which the 79th book is cited in D. xxxvii. 6. 1 1. § 9; 10. 1 1. § 8. Marcellus wrote notes on the *Regulae*, D. xxviii. 1. 1 16; xlix. 17. 1 10. To this or the next reign belongs his Commentary on Plautius in 7 books. To the reign of Marcus Antoninus belong his *Epistulae* and *Uariae Lectiones*, which are named separately in the Florentine Index as having

respectively 20 and 15 books, but which are treated as one work in the inscriptions of D. iv. 4. 1 50; L. 12. 1 15. The 40th and 41st book of the *Lectioes* is cited in D. viii. 5. 1 8. § 6; xx. 2. 1 2. The eighth book of a work *de stipulationibus* is quoted in D. vii. 4. 1 5. § 2; and his notes to Aristo are frequently mentioned. Julian appears to have used Pomponius' books *ad Sabinum* (Vat. Fr. 88; D. xvii. 2. 1 63. § 9) and Pomponius used at least the earlier books of Julian's *Digesta*.

Some writers have thought there were two lawyers called Sex. Pomponius, but there appears to be no necessity for this, in itself very improbable, conclusion. In D. xxviii. 5. 1 42 (41) the last words '*ut refert Sextus Pomponius*' may be part of the extract from Julian, which ought to have been struck out by the compilers, when they inserted the extract from Pomponius instead of Julian's account of it. In D. xxx. 1 32 *tam Sextus quam Pomponius*, in xxix. 5. 1 1. § 27 and Gai. ii. 218 where Sextus is also mentioned, Mommsen (*Z. R. G.* vii. p. 479) and others suppose Sex. Pedius or Sex. Caecilius Africanus to be probably meant, though such a view is only necessary in the first passage. (Vat. Fr. § 88 is emended by Mommsen.) An extract in D. xl. 5. 1 20 has led some to infer that Pomponius lived to the age of 78, but Pomponius is there relating a question put to him, not speaking in his own person.

There are 578 extracts from Pomponius in the Digest: they occupy more than 70 of Hommel's pages. Rather more than half (37 pages) are from the *Libri ad Sabinum*; and a fifth (13½ pages) from the *Libri ad Q. Mucium*. But the citations of him by Ulpian and others are very numerous—more than 400 (in addition to the extracts). Some of the longer extracts are D. xvi. 1. 1 32; xix. 1. 1 6; xxxiii. 1. 1 7; xxxiv. 2. 1 34; xli. 1. 1 30.

TERENTIUS CLEMENS wrote a work in 20 books *ad leges*, i.e. on the Julian and Papian Poppaeian laws, from which there are 35 extracts, mostly short, in the Digest. They fill 3½ of Hommel's pages. The longer extracts are D. xxiii. 3. 1 61; xxxi. 1 53; xxxv. 1. 1 62. He calls Julian *noster* (xxviii. 6. 1 6) and frequently quotes him. Twice he seems to refer to the xlvth book of Julian's Digest. The expression *Iulianus aiebat* perhaps indicates that it was written after Julian's death (xxxv. 1. 1 64). Hence Terentius' work was probably written towards the end of Antoninus Pius' reign (Fitting).

IUNIUS MAURICIANUS is named in the Florentine Index as author of one work in 6 books *ad leges* (see above). From this there are three extracts in the Digest, xxxi. 1 57; xxxiii. 2. 1 3; xlix. 14. 1 15. Another work *de poenis* has supplied one extract, ii. 13. 1 3. His opinions are quoted by Ulpian five times in the Digest (ii. 14. 1 7. § 2; vi. 1. 1 35. § 1; vii. 1. 1 25. § 1; xxviii. 2. 1 3. § 5; xli. 10. 1 1. § 1), and also in Vat. Fr. 75; once by Paul (D. v. 3. 1 36. pr.). In two of these he remarks on Julian. He probably wrote under Ant. Pius (Fitting).

## CHAPTER XIII.

### JURISTS OF SECOND HALF OF SECOND CENTURY.

MAECIANUS, i.e. L. UOLUSIUS MAECIANUS, was instructor in law of Marcus Antoninus (Capit. *Marc. Ant.* 3) and afterwards one of his council (Capit. *Ant. P.* 12). He was governor of Alexandria, and was killed by the army, without the knowledge of Marcus, because he favoured the assumption of the imperial purple by Avidius Cassius A.D. 175 (Capit. *M. Ant.* 25, where '*filium Cassii*' must be corrupt; *Avid. Cass.* 7). In a rescript of Marcus and Verus, Maecianus is called *amicus noster ut et iuris civilis praeter ueterem et bene fundatam peritiam anxie diligens* (D. xxxvii. 14. 1 17). He thrice speaks of Julian as *noster* (e.g. D. xxxv. 2. 1 30. § 7).

In the Florentine Index he appears as author of *Fideicommissa* in 16 books (written in Ant. Pius' reign) and *Publica (iudicia)* in 14 books. From the first there are 40 extracts in the Digest; from the second only three. There is also a Greek extract from '*Uolusius Maecianus ex lege Rhodia*' (D. xiv. 2. 1 9), containing a rescript of Antonine's declaring the Rhodian law in matters of shipwreck to be valid, so far as it was not contrary to any Roman law. Maecianus is cited 17 times in the Digest. The extracts fill more than seven of Hommel's pages. Some are of considerable length, e.g. xxxv. 2. 1 30; 1 32; xxxvi. 1. 1 66 (64); 67 (65); xlix. 17. 1 18.

A short treatise by him is preserved to us independently and is found in the collections of ante-Justinian law books. It is addressed to Caesar (doubtless to his pupil Marcus Antoninus), and contains a description of the various parts of the *as* (i.e. the fractions which



were used in dividing an inheritance; see D. xxviii. 5 *passim*), and of the modes of noting and naming the odd pence or fractions (*aes excurrens*), when the reckoning is made in *denarii* or *sestertii*. That is to say, he first describes and names the various fractions which have 12 for a denominator ( $\frac{1}{12}$ ,  $\frac{2}{12}$ , &c.), then shews how to express sixteenths (the *denarius* of 16 *asses* being taken as the unit) by twelfths, half-twelfths, &c.; and finally how to express eighths (the *sestertius* of 4 *asses* being taken as the unit) by tenths, twentieths, &c. (See my *Lat. Gr.* vol. i. app. D.) Some weights and measures close the treatise.

GAIUS is a writer of whom we literally know nothing except that he was the author of several books of Roman law, which internal evidence shews to have been written about the time of the earlier Antonines. One of the extracts from his works records an incident which happened to Hadrian in his time (*nostra aetate* D. xxxiv. 5. 17. pr.). The earliest certain mention of him is the law of Theodosius II. and Valentinian III. A.D. 426, which put his writings in the same authoritative position as those of Papinian, Paul, Ulpian and Modestin (see above, p. lxxiv). About this time, whether before the law (Huschke *Z. R. G.* xiii. 9), or after (as others suppose, see Rudorff *R. G.* i. p. 286), an extract from his Institutes (iii. 1—17) is given in the comparison of Mosaic and Roman laws, which is called *lex Dei*, or *Collatio Mos. et Rom. Legum* xvi. 2. The grammarian Priscian (*Inst.* vi. 96), who wrote at Constantinople somewhere about 500 A.D., quotes two lines from the Institutes (i. 113). The *lex Romana Visigothorum*, prepared by a commission of Bishops and provincial nobles at Aire in Gascony, under the authority of King Alarich II. A.D. 506, as law for the subject Romans of that kingdom, contains, along with *Pauli Sententiae*, part of the Theodosian Code and other fragments, an epitome<sup>1</sup> in two books of the first three books of Gaius' Institutes. Justinian names Gaius three times. He describes his own Institutes to be put together from other institutes and treatises, but especially from the Institutes and *Res Cottidianae* of 'our Gaius' (*Praef. Inst.* § 6): in the Institutes themselves (iv. 18. § 5) he quotes from the work of 'our Gaius' on the Twelve Tables;

<sup>1</sup> Fitting argues that it was made between A.D. 384 and 428, or at latest 438. It disallows marriage of first cousins, hence is later than Theodosius' law prohibiting it (Jac. Gothof. *Cod. Th.* i. p. 332 and iii. p. 1021). It treats *dictio dotis* as still in force; hence before *Cod. Th.* iii. 13. 14.

and, in describing the old course of legal study, he mentions that the first year's course consisted of six books of 'our Gaius', viz. the Institutes and four separate treatises on wife's property, guardian-ships, wills and legacies (Const. *Omnem* § 1). '*Noster Gaius*' probably denotes only familiarity with Gaius' books. The use of these books in the Digest will be mentioned below.

There are some other references to 'Gaius', but it is disputed whether Gaius Cassius Longinus, the chief of the Sabinian school, or the writer of the Institutes (also a Sabinian), is meant. One is by Julian (D. xxiv. 3. 1 59) who speaks of Gaius' giving the same opinion as Sabinus; another by Javolen, *libro secundo ex Cassio* (D. xxxv. 1. 1 54), where he says an opinion *in commentariis Gaii scriptum est*; a third by the same writer, '*libro undecimo ex Cassio*' (D. xlv. 3. 1 78), who says of an opinion '*in libris Gaii scriptum est*'; a fourth by Pomponius, '*libro vicensimo secundo ad Q. Mucium*' (D. xlv. 3. 1 39), who approves '*quod Gaius noster dixit*' on a cognate question to that treated by Javolen. The age of the writers, especially of Javolen, makes it unlikely that it was the author of the Institutes that is meant in any of these cases, though, as he wrote on Q. Mucius, he was an author not unlikely to have been referred to by Pomponius. Asher (*Z. R. G.* v. 85) however makes it probable that *noster* was used by pupils of their teachers, as it was used by a slave of his master. Hence Pomponius could not have called the Institution-writer *noster*. Servius, the Commentator on Vergil (*Georg.* III. 306), says *apud maiores omne mercimonium in permutatione constabat, quod et Gaius Homericō confirmat exemplo*. This would fit Gaius *Inst.* III. 141 very well; but it is clear from this very passage and from D. xviii. 1. 1 1. § 1, that these lines of Homer were a stock quotation used by Sabinus and his school. Still it must be remembered that the Institutes were certainly in circulation in Servius' time (in 400 A.D.), and we know of no book of Cassius' that was.

Mommsen has put forward the ingenious suggestion that Gaius was a law professor, not at Rome but at Troas in the province of Asia. He bases this theory on the following facts taken together<sup>1</sup>. (a) Only his *praenomen* is known, and for a man to be called by that only is in conformity with the usage of Greek districts only. (b) He

<sup>1</sup> Mommsen's essay is in Bekker and Muther's *Jahrb. des gem. Rechts* III. (1859) p. 1 sqq. I only know it at second hand, e.g. through Kuntze *Excurs.* p. 337; Bremer *Die Rechtslehrer* p. 77, and other books.

is familiar with Greek ordinary language, as well as with Greek writers (D. XIX. 2. 1 25. § 6; L. 16. 1 30. § 2; 1 233. § 2; 1 236); and quotes the laws of Solon (D. X. I. 1 13; XLVII. 22. 1 4). (c) He gave special attention to the law of the provinces. He wrote on the *edictum provinciale*, that is to say on 'the edict of the province', whatever it was, in which he resided (see below). (d) Further he mentions laws of foreigners parallel to or divergent from those of Rome, e.g. *Inst.* I. 55 that of the Galatians; ib. 193 that of the Bithynians; III. 96; 134 foreigners in general. (e) He wrote on antiquarian matters, e.g. he is the only post-Augustan jurist that wrote on the XII tables, and yet he ignores laws, e.g. *S. C. Tertullianum*<sup>1</sup> (cf. Gai. III. 24), which no jurist in Rome could be ignorant of. (f) He was a voluminous writer, and yet evidently had not the *ius respondendi*, for he does not allude to his having such a position (e.g. in I. 7), and no *responsa* of his are anywhere given or quoted in the Digest or elsewhere. Nor was he busied with practical cases, for no *quaestiones* are mentioned. (g) His writings are not noticed as authorities until the beginning of the 5th century, therefore about 250 years after they were written. (h) Gaius mentions three towns as having the *ius Italicum*, Troas, Berytus, Dyrrachium. The first of these was one of the most important towns of the province of Asia, and, since Augustus, a Roman colony, with Latin as the official language, as is proved by coins and inscriptions. The province was one to which the edict of Q. Mucius Scaevola applied, and this appears to have been regarded as a model provincial edict (Val. Max. VIII. 15. § 6; Cic. *Att.* VI. 1. § 15; see above p. cv), and Q. Mucius was one of the writers on whom Gaius commented (*Inst.* I. 188).

To this argument Huschke (*Praef.* to Gaius) replies that other instances of Romans being known by their *praenomen* occur, e.g. Servius (Sulpicius) and Sextus (Pomponius); that the edict of the province of Asia would have been called not *provinciale*, but *Asiaticum*, as Verres' edict was called *edictum Siciliense*; and that no juriconsult would have thought of writing a work in thirty books on the edict of a single province; consequently the *edictum provinciale* must have meant an edict applicable to any province, on the analogy of *provinciale solum*, *provincialis senator*, &c.; that the references

<sup>1</sup> The date of this *S. C.* is uncertain. Most refer it to the time of Hadrian on the authority of Just. III. 3 § 2; others to that of Ant. Pius on the authority of Zonaras XII. 1 p. 593 c, and on the fact that a Tertullus was consul A.D. 158. See Schirmer *Erbrecht* I. n. 87.



to the law of the Bithynians and Galatians were really made by Hadrian, and Gaius merely reports them; and in any case other jurists consulted into the law of the provinces (Gell. xx. 1. § 4; Dosith. 12); that the examples used by Gaius shew that he lived at Rome, not in Asia, e.g. *si navis ex Asia venerit* (D. xxviii. 5. 1 33); *si inter eos qui Romae sunt, talis fiat stipulatio* 'Hodie Carthagine dare spondes?' (D. xlv. 1. 1 141. § 4; &c.); *si is qui ita stipulatus fuerit* 'x milia Ephesi dare spondes?'...*Romae pure sic intenderit* (Inst. iv. 53) &c.; and that even in the extracts from the books *ad edict. prou.* he speaks of *fundus Tusculanus*, *vinum Campanum*, *triticum Africum* (D. xlv. 1. 34) &c.; speaks of the praetor instead of the proconsul (D. xxxv. 3. 1 11); names as the day for prayers for the emperor the third day after *Kal. Jan.*, which applied to Rome and not to the provinces; &c. Gaius (says Huschke) may have been a Greek born in some Roman colony in the East, and certainly shews the open mind and theoretical training and bent which you would expect from a Greek intellect.

Dernburg (*Die Institutionen des Gaius*, pp. 89, 90) points to the mention of the praetor, not the proconsul, &c. in such places as III. 224; II. 163; III. 57; IV. 165; &c. as evidence of the writer's familiarity with the practice of the Roman courts rather than of the provincial governors. Kuntze (*Der Provincialjurist Gaius*, 1883, p. 5) refers to such expressions as *apud peregrinos non similiter ut apud nos, in tutela sunt feminae* (Gai. i. 193), *qualem nos habemus* (ib. 55), *quod nos telum appellamus, illi βέλος appellant* (D. l. 16. 1 233; cf. 1 236) as implying a contrast between Gaius' position and that of foreigners, but suggests that though a Greek by birth (e.g. freedman or freedman's son) he was a Roman citizen. Bremer suggests that Berytus was a famous law school, and that if we suppose Gaius to have been born in Troas but to have lectured at Berytus, we meet Huschke's difficulties.

I cannot see that there is sufficient to convince one on either side. The combination is certainly attractive for Mommsen's hypothesis; and it would to some extent perhaps account for Gaius being apparently so long unknown, or at least, unquoted. That Gaius was a professor and not a consulting lawyer is very probable; and that he was a Greek, as Ulpian was a Tyrian, is likely enough. As professor there is nothing very strange in his commenting on the XII tables, or on the stores of old civil law contained in Q. Mucius Scaevola's work, and it requires no special

explanation how a man of a literary and antiquarian turn came to quote Solon's laws or give odd pieces of information about the laws of foreign nations. Indeed it would be strange if a writer on the *edictum provinciale* did not pick up such matters. The entire absence of any other name than Gaius is certainly remarkable, but this must be taken in connexion with the fact that he is never mentioned till the 5th or 6th centuries, and then only as the writer of certain books. These books no doubt bore only the name of Gaius: why, remains a mystery. Other Greek writers were not content with only a Roman praenomen. Moreover the facts that he was first recognized as an authority in the Western provinces, and that none of his writings are in Greek, as some of Modestin's and one of Papinian's were, do not seem to favour Mommsen's hypothesis. That Troas was not very far from Constantinople can scarcely have had any influence on Justinian's recognition of him. Justinian followed Theodosius, and the law of Theodosius and Valentinian was issued at Ravenna. Troas was not a law school then, or at any time, so far as we know. Gaius' supposed ignorance of the *S. C. Tertullianum* is probably a wrong inference from the silence of the ms. There is a gap in the ms. in its present condition in the very place where the *S. C.* would be mentioned (III. 33) and, besides the incompleteness of the ms., Gaius' plan, whatever it was, certainly led to some other omissions, which can hardly be attributed to ignorance, e.g. the *S. Consulta Uelleianum* and *Macedonianum* are not mentioned (see below, p. clxxxi). The question of what is meant by the *edictum provinciale* is interesting and requires a few words.

Mommsen denies absolutely that there was or could be any generally applicable provincial edict. The substance no doubt of the edict in various provinces was to a large extent the same, because it included a great deal of the city edict (see above, p. clxiv), but formally each province had its own edict, issued by its own governor, and binding only within his jurisdiction. No other meaning occurs to Mommsen for Gaius' naming it *edictum provinciale*, than that it was the edict of the province in which Gaius lived. A general provincial edict is as unreal as a general man (*Z. R. G.* ix. p. 96; *Staatsrecht*, II<sup>2</sup>. 213). As an authority on such a point there is none greater than Mommsen. Yet I cannot think this either an adequate interpretation of the words or the easiest hypothesis on the subject. It is very improbable that in Gaius' time, after Julian had revised or 'composed' the edict, whatever may have been the import of that

term, the governors in all the different provinces continued to exercise the same power of promulgating a fresh legislative code which they did exercise in the days of Cicero. For nearly two hundred years the legislative and controlling power had ceased to be dispersed among a variety of offices, and exercised with a quasi-independent authority in the various isolated countries subject to the Roman power: it had been gathered up in the person of the Emperor, and administered in his name or under his influence in what were now parts of one consolidated empire. Subordinate details may have been still variable and varied, but the recognition and enforcement of contracts, wills, and inheritances of provincials must have been regulated on the same general principles, though modified according to the customs of the country, in Asia and Syria, in Macedonia and Africa, in Spain and Gaul. These general principles would have a common shape, which would not indeed be identical with the city edict but partly identical, partly modified, partly perhaps differently conceived. Whether Julian did to this what he did to the similar body of law, which composed the main part of each city-praetor's edict, we do not know, but there is nothing to shew that he did not. Our knowledge of his work and procedure is meagre at best: and it seems improbable that there should not have been felt the same necessity for revising the one as the other. The provinces were more important relatively to Rome in the time of Hadrian than they were in the time of Cicero, and the more completely they were incorporated as members of one empire, the more desirable it would be that the common basis of their ordinary legal business should be revised. The fact, that Gaius' work was handled by Tribonian and his colleagues *pari passu* with Ulpian and Paul's works on the edict, shews (and this Mommsen agrees to) that materially they coincided to a considerable extent. But they would probably coincide still more largely when viewed under the light of Justinian's own changes of the law and his confirmations of the changes already wrought by previous legislation or by practice. For these changes assimilated the law of Rome to the law of the world<sup>1</sup>. The extension by Caracalla of Roman citizenship to the whole world, the decay and omission of the old conveyances by *mancipatio* and *in iure cessio*, the development of *usucapio* into *longi temporis praescriptio*, the practical substitution of written acknowledgments of debt or

<sup>1</sup> On *ius gentium* see the careful examination in Clark's *Pract. Jur.* ch. xiv.



promissory notes for the old *litterarum obligatio* (Gai. III. 133, 134), the cessation of marriage with *conuentio in manum*, the abolition of the differences of the four forms of legacy, and other changes would have been already long before acted on in the edicts for the provinces, though in what shape, whether by aid of fictions (cf. Gai. IV. 37, 38), or by direct and simple forms, we do not know. Nor is it possible to say whether what Gaius commented on was the traditional common part of the provincial edicts, or a revision by Julian, sanctioned by Hadrian. But that the name *edictum provinciale* should have been given to such a usual and common part of provincial edicts seems to me natural enough. And I doubt whether each provincial governor actually on entering office during the empire would formally promulgate *in extenso* such usual and common part. A general reference would probably suffice. That the edict of a single province would be commented on in thirty books by Gaius, that such a book would survive till Justinian's time, and be used by him along with the great books on the Praetor's Edict, and that the name of such a work would be not *Asiaticum* but *provinciale*, I do not believe<sup>1</sup>.

Turning now to the list of Gaius' works, the Florentine Index mentions thirteen, viz. 32 books on the Provincial Edict (no doubt, including two on the Aediles' Edict), a work on the urban edict of which it states 10 books only were found, 15 books *ad leges*, six books on the XII Tables, seven books *aureorum*, four books of Institutes, three books *de uerborum obligationibus*, three books *de manumissionibus*, two books on Trusts, and four single books on Cases, Rules, Dowry and Hypothec.

Of these the Institutes only is preserved to us independently of the Digest. Niebuhr's discovery of it (A.D. 1816) in the library of the Chapter at Verona, and the first notices of it will be found in Savigny's *Verm. Schr.* III. p. 155 sqq. Since the first decipherment of it by Goeschen and Bethmann-Hollweg, it has been reexamined by Bluhme, and finally by Studemund, who has issued both an exact copy of it page by page and line by line (*Apographum* 1874) and, in conjunction with P. Krüger, a handy edition of it. Ed. Böcking's editions and *Apographum* are (except for the notes) superseded by these. Huschke's edition is remarkable for learning and ingenuity,

<sup>1</sup> Mommsen expressly says that Gaius commented on the edict of his province, i.e. Asia, and yet he agrees that it is an absurdity to suppose him to have written in thirty books on the edict of a single province (see *Z. R. G. l. c.* and *Staatsrecht* l. c.). I cannot reconcile these statements.

but is too conjectural to be safely used, except as checked by others. Dubois has in the most painstaking way reprinted the Studemund text, and given the most exact account of the readings of all the editors (Paris, 1881). Those who have not Studemund's *Apographum* will find this edition largely to supply the place. He has also made a list of the more important passages where Studemund's new reading of the palimpsest throws new light. Of English works (at present) only Prof. Muirhead's scholarly edition is based on Studemund's collation, but this objection to other editions will doubtless be soon removed.

The Institutes were written according to Dernburg in A.D. 161, part, viz. Book I. and the greater part of Book II., at least as far as § 151, before the death of Anton. Pius, the rest including II. 195 after his death, and published at once. Ant. Pius died 6 or 7 March. Mommsen refers the second book entirely to the time of Marcus Antoninus (*Z. R. G.* ix. 107). Huschke agrees with Dernburg as to the second book, but thinks the books were published separately. This seems to have been the first institutional treatise in the history of Roman law. Its style, its omission of some important matters (*dos*, *commodatum*, *depositum*, *pignus*, *obligationes quasi ex contractu*, and *quasi ex delicto*, several important *senatus consulta*, *peculium castrense*, the *querela inofficiosi test.* (Dernburg *Gaius* p. 37), its unequal treatment of some matters compared with others, its repetitions (comp. I. 22 with III. 56; I. 156 with III. 10; II. 35—37 with III. 85—87; II. 86—96 with III. 163—166; III. 181 with IV. 106—108) have been adduced by Dernburg as evidence that the work was notes for lectures, and, if so, was probably written for the session January to July of 161 A.D. and published by himself.

Fitting refers to the reign of Ant. Pius the commentaries on the provincial and urban edicts, and perhaps the books on verbal obligations and on the XII tables. After the death of Pius come the books on the Julian and Pap. Poppaeian law and on trusts. After 178 A.D. comes the treatise on the *S. C. Orfitianum*. In the Institutes Gaius speaks of having previously written on the Edict and also of two other works not named in the Florentine Index, *Libri ex Q. Mucio* (I. 185) and *de bonorum successione* (III. 33, 54).

The commentary on the provincial edict contributes numerous extracts to the Digest. The extracts occupy 33 of Hommel's pages. Some of the longer extracts are D. XIII. 6. 1 18; xv. 1. 1 27; xviii. 1. 1 35; xix. 2. 1 25; xxxv. 2. 1 73. There are a few extracts from

a work on the Curule Edict in 2 books, which added to the 30 books, *ad ed. prcu.*, from which extracts are found, make up the 32 books attributed to the latter by the Index.

Of the commentary *ad edictum urbicum*, or, as named in the Digest *ad ed. praetoris urbani* the Index says the compilers found only 10 books. The treatises referred to in the Digest, as part of this, are quoted not by the number of the particular book of the commentary but by the subject-matter: viz. *de testamentis*, in 2 books (e.g. D. xxviii. 5. 1 32; 1 33); *de legatis* in 3 books (D. xxx. 1 65; 1 69; 1 73); or by a particular title, viz. the first four titles of D. xxxix. (1 19; 1 28; 1 19; ix. 4. 1 30; xxxix. 3. 1 13; 4. 1 5; xix. 1. 1 19); *de liberali causa* (D. xl. 12. 1 2; 1 9); *de re iudicata* (D. xlii. 1. 1 7); *de praedictoribus* (D. xxiii. 3. 1 54) and *qui neque sequantur neque ducantur* (D. l. 16. 1 48). One extract from a work *de tacitis fideicommissis* (D. xxxiv. 9. 1 23), and one from a work *de S.C. Tertulliano* (D. xxxviii. 17. 1 8), are also found. The work *ad leges* in 15 books is doubtless represented in the Digest by a number of extracts *ad legem Iuliam et Papiam*. A '*lex Glicia*', from a work on which one extract is taken (D. v. 2. 1 4), is otherwise unknown. The four *libri singulares* named by Justinian (Const. *Omnem*, § 1 above p. xxvi) as then forming part of the regular instruction, may be identified respectively with the treatise called *Dotalicion* in the Flor. Index (from which there is no extract) and the parts of the commentary on the city praetor's edict on guardianship (Gai. i. 185), testaments and legacies.

The treatise called '*aureorum*' in the Index is that named in Justinian's preface to the Institutes as *Res cottidianae*. Both names are given in the Digest, in xli. 1. Long extracts of an institutional character are found in that title and in xlv. 7 and xvii. 1. 1 2. Much of them has passed also into Justinian's *Institutes*. The work *de casibus*, from which there are several short extracts, did not relate apparently to actual, but only to hypothetical, cases or points.

The total number of extracts from Gaius in the Digest are 535. They occupy 63 of Hommel's pages. Gaius is never quoted by other lawyers unless any of the four passages named above (p. clxxv) refer to him.

The style of Gaius is that of an accomplished teacher. It shews clear analysis of the subject-matter, neat division definitely expressed, with ease and precision. There are no superfluous words, and the



words are well adapted to give the meaning. The Latin is easy and good. Lachmann (*Kl. Schr.* p. 229) speaks of the 'noble elegance' of his style. The almost uniform current of praise which had prevailed has been somewhat broken of late, especially by Kuntze (*Excurs.* p. 338, ed. 2) who considers him to have second-rate ability, and talks of his want of precise thought, of his errors in legal history, and his trivialities and awkwardnesses. And quite recently he has enlarged upon this in a pamphlet called *Der Provinzial-jurist Gaius wissenschaftlich abgeschätzt*, Leipzig, 1883. This criticism is well and clearly expressed, but the perspective is unhistorical and therefore wrong. Gaius cannot be judged as if he lived in the days of historical criticism, or had been trained in a German school of scientific law. There is no doubt a certain *naiveté* about his explanations of the origin of laws, which reminds us of our own Blackstone. Like Blackstone too he wrote *ad populum*, at least in his Institutes. And Gaius certainly hit the right mean between pedantic precision and loose generality of statement. It is more difficult to criticise the extracts in the Digest, because one can never be sure they have come to us as Gaius wrote them. As for errors in legal history, how many lawyers, not specially schooled to it, write without them? and what ancient writer is better than Gaius? Kuntze however, after all, calls Gaius a clever and accomplished teacher, though without creative force or a creator's conscious independence. The praise at least we may accept, and perhaps suspend the blame, until we have some other work of Gaius, continuous and authentic, of a character better adapted to shew creative power than a first book for students.

UENULEIUS SATURNINUS is named in the Florentine Index (immediately after Gaius) as the author of five works: *Stipulationes* in 19 books; *Actiones* in 10 books; *de officio proconsulis* four books; three books of *Publica (iudicia)*, and one book *de poenis paganorum*.

There are in the Digest 71 extracts from the works of Venuleius filling 10 of Hommel's pages. Of these the *Stipulationes* occupy four; the rest are from the *Actiones*, the *de officio proconsulis*, the *Publica iudicia* and another work (perhaps part of the *Actiones*, but) called in the inscriptions of the extracts *Interdicta*. One of the four extracts from the *de officio proconsulis* (xl. 14. 1 2) is inscribed simply *Saturninus* (not *Uenuleius Sat.*). These works were written after the death of Hadrian and refer to no one later than Julian. There is no extract from a work of Venuleius *de poenis paganorum*. (In

D. XLVI. 7. 1 18 *disputationum* seems to be a mistake for *stipulationum*.)

But in D. XLVIII. 19. 1 16 immediately following an extract from Venul. Saturn. *de off. procons.* is an extract from Claudius Saturninus *libro singulari de poenis paganorum*. And rescripts of Pius to Claudius Saturninus are mentioned in D. xx. 3. 1 1. § 2; L. 7. 1 5. (4.) pr. In D. xvii. 1. 1 6. § 7 a Claudius Saturninus is mentioned as praetor. Tertullian (*Cor. Mil.* 7) speaks in high terms of a treatise by Claudius Saturninus respecting chaplets (*de coronis liber*). See Teuffel-Schwabe<sup>4</sup>, *Nachtr.* p. 1211.

Some (e.g. Fitting) consider these to be the same person, Claudius Venuleius Saturninus. Teuffel-Schwabe objects that there is nothing in the extracts from Venuleius, which is at all similar to quotations from Demosthenes and Homer, such as we find in Cl. Saturninus. The matter is further complicated by D. xii. 2. 1 13. § 5, which speaks of Quintus Saturninus agreeing with Marcellus, and xxxiv. 2. 1 19. § 7 in which Q. Saturninus' tenth book *ad edictum* is mentioned. But, except the name Saturninus, there is nothing to connect him with the other jurists or jurist so named. Ulpian in three places (D. i. 9. 1 1. § 1; XLVII. 14. 1 1. § 4; 18. 1 1. pr.) and Modestin in XLVIII. 3. 1 14. § 7 quote Saturninus.

Cod. vii. 35. 1 1; v. 65. 1 1 seem to have nothing to do with the jurist.

Of the longer extracts from Venuleius are D. XLII. 8. 1 25; XLIII. 24. 1 22; XLIV. 3. 1 15; XLV. 1. 1 137; XLVI. 8. 1 8; XLVIII. 2. 1 12. Huschke conjecturally attributes to Venuleius Vat. Fr. 90—93.

MARCELLUS, i.e. L. ULPUS MARCELLUS was in the legal council of Antoninus Pius, and also, as we know from his own words, in that of Marcus Antoninus (*Spart. Ant. P.* 12; D. xxviii. 4. 1 3). He was also imperial legate *pro praetore* in Lower Pannonia, as we learn from an inscription found at Sopiana, now Fünfkirchen, in Hungary. It records the performance of a vow to Virtue and Honour. *Uirtuti et Honori L. Ulpus Marcellus Leg. Aug. pr. pr. Pannon. inf. u. s.* (i.e. *uotum soluit, Corp. I. L.* III. no. 3307; cf. 3306).

The Epitomator of Dio Cass. LXXII. 8 speaks of an Ulpus Marcellus as sent by Commodus against the Britons, who had crossed the wall. He is described as very moderate and economical, of lofty spirit, superior to bribes, but not pleasant or sociable. Sleepless himself, he used to send written messages at different hours of the

night to the several officers. He had his bread from Rome, not because he preferred it to the bread of the country but that from its staleness and hardness it might not tempt him to eat too much. His success against the Britons was sufficient to excite against him the jealousy of Commodus. Mommsen (note on above inser.) treats Dio's Marcellus as different from the lawyer: others think the legate in Pannonia and commander in Britain was son of the jurist (Teuffel Schwabe<sup>4</sup>, § 360. 8). Most writers identify them; but there is some difficulty in supposing him to have been sent to Britain for such a task, at least 25 years after he had a seat in the imperial council.

According to the Florentine Index Marcellus wrote *Digesta* in 31 books, six books *ad leges* (*Iuliam et Pap. Poppaeam?*), and one book of *responsa*. He also appears in the Digest as an annotator on Julian (see above) and on Pomponius (D. xxviii. 1. 1 16; xxix. 2. 1 63; xlix. 17. 1 10): and the fifth book of a work *de officio consulis* is also quoted by Marcian (D. xl. 15. 1 1. § 4). In two extracts from a book *de officio praesidis* (D. xl. 15. 1 1. § 4) and from another called *Publica* (D. iii. 2. 1 22) the name of Marcellus is generally considered to be a mistake for that of Macer, who is known to have written such works. One expression of Ulpian's has become almost proverbial, as if a thing must be very plainly true for Marcellus to abandon criticism and agree with Julian: *et ait Iulianus teneri, et est uerissimum, cum et Marcellus sentit* (D. ix. 2. 1 27. § 3); cf. Cujac. *Observ.* xiv. 35. It is quite possible that Ulpian only meant to emphasize the weight due to the consentient opinions of two lawyers of such high authority, without implying any over-captiousness on the part of Marcellus. Ulpian wrote notes on Marcellus (D. xx. 1. 1 27; xxvi. 7. 1 28; xxix. 7. 1 9).

There are in the Digest 161 extracts from Marcellus, including the two supposed to be really from Macer. All but a few are from the *Digesta*, which, according to Fitting, was written under the *Diui fratres* A.D. 161—167. The extracts from Marcellus are mostly short and therefore occupy only 21 of Hommel's pages. But there are 253 citations of Marcellus. See also Vat. Fr. 75, 82, 84. The following extracts are of fair length: xxiii. 3. 1 39; xxiv. 3. 1 57; xxviii. 4. 1 3; xxxv. 2. 1 56; xxxvi. 1. 1 44; xl. 5. 1 56; xlvi. 3. 1 72. That from the 28th book is specially noticeable, as giving in some detail an account of the argument in a case where a testator had run his pen through the names of the heirs, and the



crown claimed the property as escheated. Hadrian after some doubt upheld the legacies and freedoms as still valid. Marcellus was acting as an assessor to the emperor (*in cognitione principis*).

TARRUNTENUS PATERNUS, called by Dio Πάτερνος Ταρρουντήνιος, was Latin secretary to Marcus Antoninus, and was appointed by him to command a band of Cotini in an expedition against the Marcomanni (Bohemia). He was ill treated by them, and the Cotini were destroyed (Dio LXXI. 12). Under Commodus we find him Captain of the Guard. He was apparently confederate with Quadratus in his conspiracy against Commodus, and, on Quadratus and others being put to death, he with the other *praefecti praetorio* caused Saoterus, a disgraceful favourite of Commodus, to be killed. Paternus was removed from his office and made a senator, but in a few days after was charged with conspiracy to make Salvius Julianus emperor and give him his daughter in marriage. Both Paternus and Julianus were put to death A.D. 183 (Dio LXXII. 5; Lamprid. *Com.* 4; 14). Paternus wrote a work in four books *de re militari*, from which two extracts are found in the Digest XLIX. 16. 1 7; L. 6. 1 6. He is also quoted by Macer, D. XLIX. 16. 1 12. Vegetius made use of this work in writing his own, and calls Paternus *diligentissimus iuris militaris adsertor* (Veget. *Mil.* I. 8).

SCAEUOLA i.e. Q. CERUIDIUS SCAEUOLA. The full name occurs in D. XXVIII. 6. 1 38. § 3. This jurist was M. Antoninus's chief legal adviser (Capit. *M. Ant.* II). One case decided by the emperor is related by Scaevola himself, as Ulpian informs us D. XXXVI. 1. 1 23. (22.) pr. Papinian and Severus, afterwards the emperor Septimius Severus, were among his pupils (Spart. *Carac.* 8). Nothing more is known of his life. His writings mentioned in the Florentine Index were *Digesta* in 40 books, written, according to Fitting, during the reign of Marc. Antoninus and probably after the death of Verus, i.e. after A.D. 169: *Quaestiones* in 20 books, written under Commodus or later: *Responsa* in 6 books, written not earlier than Sept. Severus, as O. Hirschfeld infers from the use of the word *praefectus legionis* (D. XXVI. 7. 1 47. § 4) instead of *praefectus castrorum* (*Hermes* XII. p. 142): *Regulae* in four books: one book *de quaestione familiae* and one of *Quaestiones publice tractatae*. Some notes of his on Julian and Marcellus are also cited (D. II. 14. 1 54; XVIII. 6. 1 11; XXIV. 1. 1 11. § 6; XXXV. 2. 1 56. § 2). Claudius Tryphoninus (D. XVIII.

7. 1 10; xxxiv. 1. 1 15. § 1; 1 16. § 2, &c.) and Paulus (D. v. 2. 1 13; xl. 9. 1 26) wrote notes on his writings. Both call him *noster*, Tryphonin twice, Paul nine times. Modestin speaks of him together with Paulus and Ulpian as οἱ κορυφαῖοι τῶν νομικῶν, and in a constitution of the emperors Arcadius and Theodosius he is called *auctor prudentissimus iurisconsultorum* (Cod. Theod. iv. 4. 1 5). One of the notes of Claud. Tryphoninus is often quoted as a tribute to his great ability: but in truth Tryphoninus (D. xxxv. 1. 1 109) is merely sarcastic. The case was this. A testator appointed two heirs and requested one *ut acceptis centum nummis restitueret hereditatem Titiae coheredi suae*. Both heir and heiress enter on the inheritance, and die before the 100 sesterces are given. Titia's heir, desirous of getting the trust-inheritance, offers 100 sesterces. Can he claim to have this inheritance (or share of the inheritance)? Scaevola answered 'The heir cannot obey the condition', meaning apparently that, if it was a condition of the trust that Titia should give the 100 sesterces, Titia being now dead, the condition cannot be fulfilled (cf. D. xxx. 1 104. § 1). Tryphoninus on this remarks that it was clever of Scaevola to confine his answer to a plain point of law, though there was room for doubt whether there was any condition at all (*magno ingenio de iure aperto respondit, cum potest dubitari an in proposito condicio esset*). Tryphonin means that *acceptis centum nummis* may be interpreted 'My will is that you take 100 sesterces (out of the inheritance I leave you) and restore the rest to Titia' (cf. D. xxxv. 2. 1 93). It seems to be simply a harmless ironical compliment to Scaevola for avoiding the real difficulty and merely repeating what every one knew. See Cujac. *ad D. xxxii. 41* (Vol. viii. p. 99).

Scaevola is an important contributor to the Digest. There are 306 extracts; and many of these are of considerable length, so that they fill 74½ of Hommel's pages, 44 of which are extracts from the *Digesta*, and 20 from the *Responsa*. Besides these there are 61 citations. In the books of the Digest, treating of legacies, the extracts from Scaevola's *Digesta* and *Responsa*, are especially long and important. See xxxi. 11 88, 89; xxxii. 1 32—1 42; xxxiii. titles 1. 2. 7; xxxiv. titles 1 and 3; xxxvi. 1. 1 77 (75)—82 (80); xl. 5. 1 41; 7. 1 40. Some interesting cases are given in D. xlv. 1. 1 122. The general character of the extracts from Scaevola's *Digesta* and *Responsa* is that of a string of cases, the facts being stated with neatness and precision, and the opinion or decision of Scaevola added in very brief terms, sometimes with reasons, often with none. The

*Quaestiones* contained more discussions. See e.g. D. III. 5. 1 8 (9); 1 34 (35); XXI. 2. 1 69; XXIX. 7. 1 14. The extract given in XXVIII. 2. 1 29 is notorious for its difficulty.

It is not unusual to find passages from Scaevola twice over in the Digest and even in the same book. Fitting points out that the cases are given with a fuller statement of the facts in the extracts from Scaevola's *Digesta*, and that in those from the *Responsa* they are either abridged or have general names (e.g. *Titius*, *Maevius*) substituted for the actual names. Hence he concludes that the *Responsa* was subsequent to the *Digesta*. Mommsen, holding that *Digesta* was a term applied to an orderly arrangement of the collected works of a lawyer, puts the *Digesta* as late as after the time of Alexander Severus (*Z. R. G.* VII. p. 484). But Tryphoninus, who lived under Sept. Severus, commented on the *Digesta*, and Paulus refers to a case which is also found quoted from Scaevola's *Digesta*. It is possible that Tryphoninus' notes may have been made on the separate treatises and republished in the *Digesta*; and that Paul may have got the case from the *Responsa*. But Fitting's arrangement seems the simpler. That *Digesta* may have meant 'collected works' is possible enough, but it may have also meant 'collected cases', and been used in that sense by Scaevola.

The following comparisons are interesting.

D. XXXII. 1 93. pr. (Scaev. *Resp.*) abridged from 1 38. § 4 (Scaev. *Digest*).

D. ib. § 1 (Scaev. *Resp.*) abridged from XXXIV. 3. 1 28. §§ 13, 14 (Scaev. *Digest*).

D. ib. § 5 (Scaev. *Resp.*) nearly same as 1 38. § 8. (Scaev. *Digest*).

D. XXXVI. 2. 1 28 (Scaev. *Resp.*) abridged from XXXIII. 7. 1 28. (Scaev. *Digest*).

D. XXXIV. 3. 1 31. §§ 2, 3 (Scaev. *Resp.*) has general names for the historical names given in 1 26. § 4 (Scaev. *Digest*): but § 3 of the former is omitted in the latter.

D. XLIX. 1. 1 24. pr. (Sc. *Resp.*) is made more general, by the addition of the cases of a *tutor* and *curator*, than XLII. 2. 1 64 (Sc. *Dig.*).

Paul in his *libri ad Uitellium* has apparently copied Scaevola (Mommsen *ad D.* XXXII. 1 78): thus

D. VII. 1. 1 50 (Paul.) quotes with name a case given D. XXXIII. 2. 1 32. § 5 (Scaev. *Digest*).



D. xxxii. 1 78. pr. (Paul.) abridged from xxxiii. 7. 1 20. § 6 (Scaev. *Resp.*).

D. xxxii. 1 78. § 2 same as xxxii. 1 93. § 2 (Scaev. *Digesta*).

D. xxxii. 1 78. § 3 more specific than xxxii. 1 101. § 1 (Scaev. *Digest*).

And compare xxviii. 2. 1 19; xxxiii. 4. 1 16. esp. § 4 sqq.; 7. 1 18; xxxiv. 2. 1 32.

PAPIRIUS JUSTUS is named (as Justus) in the Florentine Index, immediately before Ulpian, as author of *Constitutiones* in 20 books. In the Digest there are 18 extracts, eight of which are taken from the first book, nine from the second book, and one from the eighth book. This last is a rescript of *Imperator* Antoninus addressed to Avidius Cassius. The others are all rescripts from *Imperatores* Antoninus and Verus. Fitting refers the work to the time of Commodus. The extracts occupy two of Hommel's pages. Of the longer are XLIX. 1. 1 21; L. 1. 1 38; 8. 11 10—12 (1 9).

PAPIRIUS FRONTO is cited four times in the Digest, viz. twice by Callistratus, D. xiv. 2. 1 4; L. 16. 1 220. § 1 (*Papirius Fronto libro tertio Responsorum ait*); twice by Marcianus, xv. 1. 1 40; xxx. 1 114. § 7 (*Scaeuola notat et Papirius Fronto scribit*).

TERTULLIANUS is named in the Florentine Index (between Gaius and Ulpian) as the author of two works: *Quaestiones* in eight books, and a single book *de castrensi peculio*. From this last there are three short extracts in the Digest xxix. 1. 1 23; 1 33; XLIX. 17. 1 4. The Code v. 70. 1 7. § 1 *a* refers to the same book, and calls him *iuris antiqui interpres*. From the *Quaestiones* there are two extracts, D. i. 3. 1 27; XLI. 1. 1 28. These five extracts occupy one page of Hommel. Ulpian cites him in the third book *ad Sabin*. D. xxviii. 5. 1 3. § 2 *et sane et Iuliano et Tertulliano hoc uidetur*: in the eighth book *ad Sabin*. D. xxix. 2. 1 30. § 6 *quod et Sextum Pomponium opinatum Tertullianus libro quarto quaestionum refert*; and in his 13th book *ad Sabin*. D. xxxviii. 17. 1 2. § 44 *quod et in magistratibus municipalibus tractatur apud Tertullianum, et putat dandam in eos actionem*.

It is clear that he wrote after Pomponius and before Ulpian's *Libri ad Sabinum*, i.e. before Caracalla's sole reign. More than this is only conjectural. There seems to be no reason for connecting him

with the *S. C. Tertullianum* (see p. clxxvi n.). But it is an interesting question whether, as is generally thought, the jurist is the same person as the great ecclesiastical writer, Q. Septimius Florens Tertullianus, who is said by Hieronymus (*de Vit. illustr.* 53) to have flourished under Severus and Caracalla, to have been from Carthage, and the son of a 'proconsular' centurion (a description which Dessau, *Hermes* xv. p. 473, suggests is due to Jerome's misunderstanding Tert. *Apolog.* 9). Eusebius (*Hist. Eccl.* II. 2) describes the ecclesiastic as τοὺς Ῥωμαίων νόμους ἠκριβηκῶς ἀνὴρ τὰ τε ἅλλα εὐδοξος καὶ τῶν μάλιστα ἐπὶ Ῥώμης λαμπρῶν. Neander (*Antignosticus* p. 202 Bohn's transl.) thinks there is sufficient in the method of argument and controversial tactics of the ecclesiastic to enable us to recognize a trained advocate, and in the juridical cast of his language and in his comparisons borrowed from law to find palpable evidence of his early studies. But Neander still hesitates to identify the two in consequence of the frequent occurrence of the name. The extracts in the Digest are few, and we have no other knowledge of the jurist, so that there is really no sufficient evidence for a decision. Mommsen (*Z. R. G.* VII. 485) notices that the word *Digesta* is hardly used except in juristic literature; but that Tertullian uses it of the Gospels (*adv. Marc.* IV. 3; *ib.* 5) and (*ad Nat.* 1) of Varro's sources (*ex omnibus retro digestis*).

MESSIUS is once quoted by Paul (*libro tertio decretorum*) in D. XLIX. 14. 1 50 *Papinianus et Messius novam sententiam induxerunt*.

PACONIUS is once quoted by Paul (*libro octavo ad Plautum*) in D. XXXVII. 12. 1 3. There is in Cod. v. 37. 1 6 a rescript addressed by Alex. Severus to A. Paconius, who may or may not be the same man. Mommsen reads *Paconius* in XIII. 6. 11. § 1 where Flor. and others have *Pacunius*, and others again *Pacuvius*.

CLAUDIUS TRYPHONINUS was a contemporary of Papinian, and was perhaps in the council of the emperor, see D. XLIX. 14. 1 50. He wrote notes on Scaevola's *Digest*, which are often (20 times) given in the Digest appended to extracts from Scaevola. Sometimes they have been treated as separate extracts, e.g. XXXII. 1 36; XXXIV. 9. 1 26 Mommsen; XL. 5. 1 17. His notes are generally given under the name of Claudius; but Claudius Tryphoninus is found in XXVI. 7. 1 58. He calls Scaevola '*noster*' (D. XX. 5. 1 12. § 1; XLIX. 17. 1 19. pr.). A rescript is addressed to him under his full name by

Antoninus (Caracalla) A.D. 213 (Cod. i. 9. l 1). The only work named in the Florentine Index is his *Disputationes* in 21 books. The date of its composition is about the time of Caracalla. In the 10th book (D. XLVIII. 19. l 39) he speaks of a rescript *ab optimis imperatoribus nostris*, which Fitting refers to Caracalla and Geta, for in the earlier books (D. XXVII. 1. l 44; XLIX. 15. l 12. § 17; cf. III. 1. l 11) he speaks of Severus as dead.

The Digest contains 80 extracts from his *Disputationes*. They fill 18 to 19 of Hommel's pages. Some of the longer extracts are XVI. 3. l 31; XXIII. 2. l 67; 3. l 78; XXVI. 7. l 55; XXXVII. 4. l 20; XLI. 1. l 63; XLIX. 15. l 12; 17. l 19. A good extract is L. 16. l 225. In XLVIII. 19. l 39 he refers to Cicero's speech for Cluentius.

## CHAPTER XIV.

### PAPINIAN, ULPIAN, PAUL.

AEMILIUS PAPINIANUS was said by some to be a relative of Severus' second wife, Julia Domna. As she was from Emessa in Syria (Capit. *Macrin.* 9), it is possible that Papinian was also from that province (Bremer p. 88). The first we hear of him is, that he with Severus adopted the legal profession at Rome under Scaevola (*cum Seuero professum<sup>1</sup> sub Scaeuola*), that is to say after attending Scaevola's lectures and public consultations, he commenced advising and teaching, while retaining in some way the advantage of Scaevola's assistance. He succeeded Severus in the office of Counsel to the Treasury (*Advocatus fisci* Spart. *Car.* 8) and afterwards was Master of Petitions and thus framed the imperial rescripts (*rescriptum ab imperatore libellos agente Papiniano* D. xx. 5. l 12. pr.). He was probably an assessor in the court of the *prae-fecti praetorio* (D. XXII. 1. l 3. § 3). Under Severus his great friend we find him A.D. 204 Captain of the Guard (*praefectus praetorio*,

<sup>1</sup> *Profiteri* 'to declare oneself as teacher, jurisconsult, &c.' is used of a teacher of rhetoric in Plin. *Ep.* II. 18; IV. 11 *passim*; of lawyers, D. I. 2. l 2. § 35; of mathematicians (Lampr. *Alex.* 27). Hence 'professor'. On the subject generally see Puchta *Cursus* § 103; Bremer *Die Rechtslehrer* &c. p. 16, who take *profiteri* to mean a declaration before a public authority (*magister census*), so as to found a claim for exemption from public burdens. Cf. Vat. Fr. § 204; D. XXVII. 1. l 6 § 12; Cod. x. 53 (52).



ὁ ἑπαρχος Dio Cass. LXXVI. 10), an office which combined military power with the highest criminal and civil jurisdiction (cf. Mommsen *Staats-Recht* II. pp. 828, 932, 1058). There were usually two or three in this office (ib. p. 831 n.). He attended the emperor in Britain (Dio ib. 14), probably up to the time of the death of Severus at York in A.D. 211. Dio mentions an attempt made there by Caracalla to murder his father; the attempt was seen and frustrated. Severus summoned Caracalla and Papinian to his tent, put a sword in the midst and told Caracalla to 'slay him if he wished, or, if he chose, to tell Papinian to do it, as he would of course execute at once a command from Caracalla' (who was emperor with Severus). I take this as merely the language of natural excitement and bitter grief, and not justifying any inference whatever as to Papinian's loyalty to Severus. Before his death Severus specially commended his two sons Bassianus (Caracalla) and Geta (Spart. *Car.* 8) to him. Caracalla dismissed Papinian from office (Dio LXXVII. 1), very probably on his dissuading him from killing his brother Geta. Caracalla persevered, and the death of Geta was followed in a day or two by that of Papinian (A.D. 212), whom he regarded as one of Geta's party (cf. Zosim. i. 9). The emperor dissembled his intention, and leaning on Papinian's shoulder was coming from the Capitol to the Palatium, when the soldiers seized Papinian and hurried him to his death. He is said to have warned them that his successor would certainly be a great fool if he did not avenge such a cruel outrage on the office of praefect,—a prophecy supposed to be fulfilled when Macrinus holding the office planned the death of Caracalla (Spart. ib.). This story seems inconsistent with Dio's statement of Papinian's having been dismissed from office before; and it would have had more point, if the vengeance had fallen on praetorians who killed their own commander. A soldier killed Papinian with an axe. He was reprov'd by Caracalla for not having done his bidding with a sword (Dio LXXVII. 4; Spart. *Car.* 4), that being the proper instrument for putting criminals to death (D. XLVIII. 19. 1 8. § 1: hence the expression *ius gladii habere* D. i. 18. 1 6. § 8; cf. 16. 1 6. pr.). The precise cause of his murder was variously reported. The more general account was that, on the emperor's requiring him to address the Senate and the people in excuse for the murder of Geta, Papinian replied that 'parricide was not so easy to defend as to commit.' Another version was that being requested to compose for the emperor a

speech justifying the murder by invective against Geta he declined, saying that to accuse an innocent man who had been slain was to repeat the parricide. Both accounts may have been true, notwithstanding Spartian's stupid objection that the prefect could not *dictare orationem* (*Carac.* 8. cf. Hirschfeld *Untersuch.* i. p. 213. n.). Papinian's son, a quaestor, was killed also (*ib.* 4).

The court over which Papinian presided included at some time Ulpian and Paul as assessors (*Spart. Pescen.* 7 ; *Lampr. Alex. Sev.* 26 ; cf. *D. XII. 1. 1* 40). No Roman law-court could have been stronger. Papinian's own reputation has received loud and constant recognition from that time to this. Spartian (*Sever.* 21) calls him *iuris asyllum et doctrinae legalis thesaurum*. Not to mention such epithets as *consultissimus*, *disertissimus*, &c. the constitution of Constantine, by which the criticisms even of Ulpian and Paul on Papinian's legal opinions were to be disallowed, is clear proof of his high authority (*Cod. Theod.* i. 4. 1 1. quoted above, p. lxxxiv.). This direction was confirmed by the well-known 'Law of citations' (*ib.* 1 3, also quoted) of Theodosius II. and Valentinianus III., which in disputed questions gave a casting vote to the opinion of Papinian. *Ubi diuersae sententiae proferuntur, potior numerus uincat auctorum, uel, si numerus aequalis sit, eius partis praecedat auctoritas, in qua excellentis ingenii uir Papinianus emineat, qui ut singulos uincit, ita cedit duobus.* Zosimus (5th century) calls him a most just man, and one who surpassed all Roman lawgivers before and after in knowledge and interpretation of the laws (*i.* 9). The third year students were called after him *Papinianistae*, his *Responsa* forming one of the chief subjects of instruction at that period of legal study. The first lecture on Papinian was celebrated by a feast. Justinian confirmed this practice and name and feast, and is loud in his praises of Papinian. He is *splendidissimus, summi ingenii* (*Const. Deo* § 6), *sublimissimus, acutissimus, pulcherrimus, maximus* (*Const. Omnem* §§ 1, 4). The students were to have a taste of the other works of Papinian besides the *Responsa*; and in one of the books of the Digest (xx.) which was to be lectured on in the third year, Justinian has dislocated the proper order of extracts in order to get Papinian at the commencement of all the titles in which his works are quoted. *Uobis ipse pulcherrimus Papinianus non solum ex responsis, quae in decem et nouem libros composita fuerant, sed etiam ex libris septem et triginta quaestionum et gemino uolumine definitionum nec non de adulteris et paene omni eius expositione in omni*

*nostrorum digestorum ordinatione praefulgens, propriis partibus praeclarus sui recitationem praebebit. Ne autem tertii anni auditores, quos Papinianistas uocant, nomen et festiuitatem eius amittere uideantur, ipse iterum in tertium annum per bellissimam machinationem introductus est; librum enim hypothecariae ex primordiis plenum eiusdem maximi Papiniani fecimus lectione, ut et nomen ex eo habeant et Papinianistae uocentur et eius reminiscentes et laetificentur et festum diem, quem, cum primum leges eius accipiebant, celebrare solebant, peragant, et maneat uiri sublimissimi praefectorii Papiniani et per hoc in aeternum memoria hocque termine tertii anni doctrina concludatur* (ib. 4). Cujas commented on the whole of the extracts from Papinian which appear in the Digest, and these commentaries, published after his death, fill a thick folio, or 1150 double-columned pages of the Prati edition in quarto. He calls Papinian 'the greatest lawyer that has been or will be: he occupies the same single preeminence among jurisconsults that Homer does among poets' (*Praef.* to Comment. iv. p. 558 Prati). Puchta justifies the admiration of ages for Papinian by his long political services, his high office, his greatness as practical jurist and writer, in which last respect very few can be compared with him, and above all by the integrity of his character and the moral force, which gave nobility to the whole of an active life and made him the model of a true jurist (*Cursus* § 100). Similarly Rudorff *R. G.* i. § 73. Mommsen speaks of him as without doubt the first of Roman jurists in juristic geniality and living sense of right and morality, but at the same time perhaps the least Roman in his thoughts and language (*Z. R. G.* ix. p. 100). Kuntze echoes the praise (*Cursus* § 321).

The style of Papinian is generally very close, the intention being to give the case or the opinion in as few words as possible. Esmarch is rapturous in admiration: 'clear and deep thought, with completely adequate expression; no word too much or too little; every word exactly in the right place; worthy of the best days of the Romans, &c.' (*Röm. R. G.* § 133, ed. 2). I agree with Mommsen in thinking the style not characteristically Roman. The construction is sometimes strained, and the words used in meanings not those of classical writers.

There is in many passages (cited by Kuntze *Cursus* § 321) a very noticeable sense of the dignity and worth of family relations and of ethical propriety. Some instances may be given. Thus where the vendor of a slave has bargained (below p. 186) that he should not



be kept in Italy, and the purchaser has broken the condition, Papinian held that a pecuniary interest must be shewn in order to entitle the vendor to claim satisfaction. The standard was *quod uir bonus arbitratur*, and it was not conformable to the character of a good man to believe that the mere gratification of spiteful feeling should found a claim for damages. On the other hand if the vendor bargained that the slave should not be shipped to foreign parts, the purchaser might be liable in damages for the breach, even if there were no pecuniary loss to the vendor, provided that the condition had been imposed from kindly feeling towards the slave. The law might fitly recognise human affection as an interest, while it refused to recognise vengeance (*beneficio adfici hominem interest hominis*) D. xviii. 7. 1 6. § 1; 1 7. Similarly xvii. 1. 1 54. pr. *placuit prudentioribus affectus rationem in bonae fidei iudiciis habendam*.

A father institutes his unemancipated son as heir, but only on a condition which the laws disapprove. Such a condition, said Papinian, must be regarded as one which it is not in the son's power to perform: for any acts which offend against due affection, reputation or modesty, must be considered as acts which we not only ought not, but cannot, do. *Quae facta laedunt pietatem existimationem uerecundiam nostram et, ut generaliter dixerim, contra bonos mores fiunt, nec facere nos posse credendum est* (D. xxviii. 7. 1 15).

A testator used no words of express trust, but contented himself by declaring that he had no doubt that whatever his wife took under the will she would restore to their children. Marcus Antoninus ruled that it should be enforced as a trust. Papinian commends the rescript on the ground that otherwise the father would be deceived in shewing due respect to a wedded life well past and trust in their common children (D. xxxi. 1 67. § 10).

See also xiii. 5. 1 25. § 1; xxviii. 2. 1 23. pr.; xxxv. 1. 1 72. § 1; xxxix. 5. 1 31. § 1.

He mentions in one place a change of opinion; the compilers have subjoined the old opinion in the next extract (D. xviii. 7. 1 6. § 1; 1 7. Cf. Cod. vi. 2. 1 22. § 3a). This is an instance of what was perhaps a not uncommon practice of the compilers, viz. when they came to a reference or citation of some other book or author to add or substitute the original. See e.g. D. i. 6. 1 2 quoted above, p. lxiv: and the suggestions made (p. lvi.) in reference to D. vii. 1. 1 33.

The Florentine Index enumerates his works used in the Digest (and we know of no others) as *Quaestiones* in 37 books; *Responsa*

in 19 books; *Definitiones* in two books, *de Adulteriis* in two books, and also in one book, and a treatise in one book called ἀστυνομικός. Papinian's name occurs second in this Index, Julian's alone being put before him. Only two of his works bear indications of the date of composition. The greater part of the *Quaestiones* (Book xvii. onwards) was, according to Fitting, written in the reign of Sept. Severus. Of the *Responsa* the fourth book was written after A.D. 206, for it contained a discussion of the terms of a constitution of that year (cf. D. xxiv. 1. 1 32. § 16; 1 53). Very probably the whole work was subsequent to that date and was perhaps Papinian's last work. It is noticeable that, while with one exception the title of consecration (*divus*) is regularly given to deceased emperors in the *Responsa*, in the *Quaestiones* on the other hand it is omitted 20 times, against 13 that it is added. So Mommsen, who suggests that Papinian had at first not thoroughly learnt the official style. The treatise ἀστυνομικός was written in Greek. We have an extract in D. XLIII. 10. 1 1. The corresponding Latin title would be *de officio aedilium*. Bremer arguing from this, as well as from his reported relationship to Julia Domna, and from some references to provincial matters which occur in his writings, thinks that he for a time lectured at Berytus. Thibaut (*Civ. Abh.* p. 140) also points out that a Greek treatise on aedile's duties would probably be intended for aediles in Greek towns.

The number of extracts from Papinian in the Digest is 601. They occupy 92 pages of Hommel, of which the *Quaestiones* supply 45 pages, the *Responsa* 40. There are 153 citations besides. The Vatican Fragments have about 50 extracts (almost all from the *Responsa*), some of which also appear in the Digest. A few passages are contained in the *Collatio* (II. 3; IV. 7—11; VI. 6), one passage of two lines (*de pactis*) is given at the end of the *lex Visigothorum*. A few mutilated bits of the *Responsa* have been lately discovered. See Krüger *Z. R. G.* xiv. 93; xv. 83; Huschke *Die jüngst aufgefundenen Bruchstücke* &c. The following parts of the Digest have series of extracts from Papinian, some extracts being of considerable length (xxvi. 7. 11 35—42; xxxi. 11 64—80; xxxv. 2. 11 7—15; xlvi. 3. 11 94—97). In book xx. he commences all the titles save one. Notes of Paul are found in D. I. 21. 1 1. § 1; xviii. 1. 1 72; xxii. 1. 1 1. § 2; and of Ulpian in D. III. 5. 1 30 (31). § 2.

DOMITIUS ULPIANUS was born at Tyre, or at least of a Tyrian family, as he tells us himself in recounting the colonies which had

the *ius Italicum*. (*In Syria Phoenice splendidissima Tyrriorum colonia, unde mihi origo est*. The right was conferred by Severus and Caracalla. D. L. 15. l 1. pr.). From his occasional mention of the Punic language (D. xxxii. l 11. pr.; XLV. l. l 1. § 6) and references to Egypt, Asia and Syria, Bremer suggests that he was resident for a time in those parts, probably as professor at Berytus (*Die Rechtschulen*, p. 87). But the first we hear of him is as assessor, apparently with Paul, to Papinian, and afterwards as either *ad memoriam* i.e. master of the records, or *ad libellos* i.e. master of petitions, Paul holding the other office (Spart. *Pescen.* 7). Some said he was *praefectus praetorio* under Heliogabalus; at any rate he was, with the senate and others, removed by that emperor from the city, and was ordered to be slain, but the order was not carried out (Lampr. *Heliog.* 16; *Alex.* 26). Under Alexander Severus we find him *praefectus annonae* (commissioner of corn supply) on 31 March, 222 (Cod. viii. 37. (38) l 4), and captain of the guard 1 Dec., of the same year (Cod. iv. 65. l 4). Alexander was only 16 years old when he came to the throne (Lampr. *Alex.* 60; Gibbon ch. vi. n. 47) and obviously required guidance. Lampridius tells us that he made, or again made, Ulpian and Paulus captains of the guard, and therefore senators; that Ulpian was one of his councillors and master of a portfolio (*scrinii ad libellos?*); further that he acted as his guardian, though against the wish of Alexander's mother, who however was afterwards thankful for it; that he was the only person who had private interviews with the emperor and was always summoned when anyone else had an interview, was present at his private dinners, and was in fact a constant companion and chief minister (*Alex.* 21; 26; 31; 34; 51; 67). Dio confirms this, saying that Ulpian was made *praef. praet.* immediately on Alexander's succession, and administered the affairs of the Empire (Lxxx. 1). Probably the Tyrian origin of Ulpian may have contributed to his selection, Alexander's parents being from Emessa, also in the district of Phoenician Syria. Zosimus (i. 11) makes his appointment directly due to Alexander's mother, Mamaea. Alexander calls him *parens meus* and *amicus* (Cod. l. c.). He is said to have been exposed to danger from the soldiers on several occasions, and to have been protected only by the emperor's throwing his purple over him (Lampr. *Alex.* 51). A three days' tumult between the soldiers and populace, in which the former attempted to burn the city down, was apparently connected with Ulpian, who is said amongst other reforms to have displaced Fla-



vianus and Chrestus (captains of the guard?) in order to succeed them. Soon afterwards the Praetorians set on him in the night, and, though he fled for refuge to the emperor and the empress-mother, at the palace, killed him (Dio LXXX. 2). It is likely enough that he fell in an effort to reduce the military under the civil power. Epagathus, who was the instigator of the attack, was sent off to Egypt under the pretext of being made governor, and from thence was taken to Crete and executed. It was not safe to attempt to punish him in Rome (ib.).

One specific recommendation on the part of Ulpian and Paul is recorded. Alexander thought of ordering a distinct dress for all offices, for all positions of dignity, and for all slaves. The jurists dissuaded him on the ground that it would lead to quarrels if men were thus marked out for insults. The emperor contented himself with distinguishing knights from senators by the character of the band on the *toga* (*clavi qualitate*, Lampr. *Alex.* 27).

Athenaeus in his 'Learned diners' introduces, as one of the guests and talkers, Ulpian of Tyre, who went by the name of *Κεϊτούκελος*, because he was perpetually asking people in the streets, promenades, bookshops and baths whether this or that word was found in a particular use or sense *κείται ἢ οὐ κείται*; 'Does it or does it not occur?' (I. 1). He is called a rhetorician, gives (xv. 20—33) an account of a number of special names for crowns or chaplets (*στέφανοι*), and ending his discourse with an expression subsequently taken as an omen, died easily (*ἀπέθανεν εὐτυχῶς οὐδένα καιρὸν νόσῳ παραδούς*) a few days after to the great grief of his friends. Athenaeus wrote this somewhere about the time of Ulpian the jurisconsult, and he introduces among the other personages at least one well-known philosopher of the time, Galen of Pergamos, the great physician who died after A.D. 199. Another personage is Masurius, a jurist (Athen. I. 2). Now Lampridius (*Heliog.* 16) after mentioning the removal of the senate from Rome, says *Sabinum consularem virum, ad quem libros Ulpianus scripsit, quod in urbe remansisset, uocato centurione mollioribus uerbis (Heliogabalus) iussit occidi*. The centurion however was happily deaf. Lampridius goes on *Remouit et Ulpianum iuris consultum ut bonum virum*. Ulpian as we know wrote a long treatise *ad Sabinum*, and Sabinus' name was Masurius (D. I. 2. 1 2. §§ 48—50). Doubtless Lampridius confused the great lawyer of Tiberius' reign with a descendant who was a contemporary of Ulpian and may have been a lawyer. The co-

incidences of 'Ulpian of Tyre' with Masurius a lawyer in Athenaeus, of Ulpian the lawyer with Sabinus, 'on' or 'to whom Ulpian wrote,' in Lampridius, and the fact that Ulpian wrote a long treatise on the lawyer Masurius Sabinus are certainly very curious. But it can hardly be (as some have thought) that Athenaeus meant to place our Ulpian among his banqueters. Neither profession, nor character, nor death agree. It may be that the rhetorician Ulpian was the father of the lawyer.

Ulpian never names Paul: Paul once only (D. xix. 1. 143) names Ulpian. Ulpian speaks of Modestin as his admirer (*quod et Herennio Modestino studioso meo de Dalmatia consulenti rescripsi* D. XLVII. 2. 152. § 20) i.e. probably a pupil. There are so few lawyers after Ulpian, of whom we have extracts, that he is rarely quoted. Macer refers to him (L. 5. 15), and Modestin calls him ὁ κρᾶτιστος (xxvi. 6. 12. § 5; xxvii. 1. 12. § 9; 14. § 1) and speaks of Cervidius Scaevola, Paulus and Domitius Ulpianus as οἱ κορυφαῖοι τῶν νομικῶν (113. § 2). Of the historians Lampridius calls him *iuris peritissimus* (Alex. 68), and Zosimus (i. 11) describes him as an excellent lawgiver (νομοθέτης), able to deal with circumstances of the time, and to forecast the future, an inspector (ἐπιγνώμων) of, and almost a partner in, the imperial power. Diocletian (Cod. ix. 41. 11) gives him the ordinary epithet of *prudentissimus*; Justinian (Cod. vi. 51. § 9) calls him *summi ingenii uir* and (Nov. 97. § 6) τὸν σοφώτατον. But the greatest tribute to him is the use made of his writings in the Digest. They form the core, and more than a third in quantity, of the whole work.

In the Florentine Index 23 of his works are mentioned; two of which are very important, the Commentary on the Edict in 81 books, to which two books on the Edict of Curule Aediles are appended, making 83 in all; and 51 books *ad Sabinum*. Fitting (not regarding the use of *imperator* as any indication of the emperor being alive at the time of the book being written, p. 3) puts Books I.—VIII. of the Commentary on the Edict before A.D. 211; IX.—L. in the reign of Caracalla (A.D. 211—217); then the Commentary on Sabinus, as far as XXXIII., during the same reign; and the rest of this commentary, and finally Books LI. to end of the Commentary on the Edict, after Caracalla's death (p. 43). Apart from the question of the use of *imperator*, this view throws an enormous amount of work on the few years of Caracalla's sole reign. Mommsen with greater probability holds that the greater part of the Edict-Commentary was written before the death of Severus, but was partly revised, completed

and published about A.D. 212 (*Z. R. G.* ix. 102, 114). Under Caracalla were written the 10 books *ad leges* (*Iul. et Pap. Pop.*); 10 books of *Disputationes*; 10 books *de omnibus tribunalibus*; 10 books *de officio Proconsulis*; six books on *Fideicommissa*; six books *de censibus*; three books *de officio Consulis*; 2 books of *Institutiones*, and one book *de officio praetoris tutelaris* which Mommsen (*Vat. Fr.* 4to edit. p. 395) thinks to be a second edition of a work *de excusationibus*, not named in the Index but probably written and published in Severus's reign. Later than Caracalla are the five books *de adulteriis*. In or after Caracalla's reign come the four books *de appellationibus* and the single books *de off. praefecti Urbi, Regulae* and *Pandectae*. The last-named is quoted from in the Digest, but a Πανδέκτων in 10 books is named in the Index. A work in four books *ad leg. Ael. Sentiam* and *de off. consularum* (one book) are similarly not named, but furnish extracts. Some notes to Papinian (see p. cxvii) and Marcellus (p. clxxxv) are also given in the Digest.

Independently of the Digest we have preserved to us 29 titles from an abridgement of Ulpian's single book of *Regulae*; and a few fragments from his *Institutiones*. The *Regulae* follow to a considerable extent the order of Gaius' Institutes but are more concise. The author evidently was familiar with Gaius' work. They have been edited by Böcking 1855 (with a discussion by Mommsen), by Huschke, and by Krüger. The fragments of the *Institutiones* have been edited with supplements from the Digest and *Collatio* by Böcking, and also by Krüger in his *Kritische Versuche* 1870. The *Collatio* has 13 extracts from the *de officio Proconsulis*, five from the *Institutiones*, three from the *Regulae*, and three from the Edict Commentary. The Vatican Fragments have over 100 extracts from treatises *de excusationibus* and *de officio praet. tutelaris*, 24 extracts from the xviii<sup>th</sup> book of the Commentary on Sabinus (this book relates to usufruct) and some others. Many of these extracts are however badly mutilated.

The treatise *de officio Proconsulis* has been made the subject of a special dissertation by Rudorff, who has collected and arranged all the fragments preserved to us (Berlin 1860). The seventh book contained an account of the legislation against the Christians, which excited Lactantius' (*Inst.* v. 11, 12) vigorous criticism. Ulpian is there called *Domitius*.

In the Digest there are 2464 extracts from Ulpian. They occupy



590 of Hommel's pages. Of these pages the extracts from the Edict-Commentary fill 342, besides 10 on the Edict of the Curule Aediles ; from that on Sabinus 130 ; from the Disputations 25 ; *Fideicommissa* 17 ; *de off. Proconsulis* 15 ; and the *opiniones* about 9 ; *ad leges Iul. et Pap.* 8, and from the treatises *de adulteriis* and *de omnibus tribunaliis* 6 or 7 pages each.

Ulpian's style is easy and good. There is often a good deal of discussion of the reasons, and quotation of others' opinions. Originally it contained still more discussion and quotation, as we can see from comparing some passages in the Vatican Fragments with their counterparts in the Digest. (See above p. lxxiii foll.)

JULIUS PAULUS was a contemporary of Ulpian's, and the few facts known of his life have been already mentioned in the account of Papinian and of Ulpian. He was an assessor to Papinian in the reign of Severus, and apparently master of the records (Spart. *Pescen.* 7). By Heliogabalus or Alexander he was made one of the captains of the guard (*praef. praetorio*) and, probably as such one of Alexander's council, and agreed with Ulpian in dissuading that emperor from his proposal to have officials, dignities and slaves marked each by a special dress (Lampr. *Alex.* 26 ; 27 ; 68). He refers to his presence in the emperor's council on certain law questions in D. IV. 4. 1 38 ; XXIX. 2. 1 97 ; XLIX. 15. 1 50, and in Papinian's court D. XII. 1. 1 40. A case in which he appeared as advocate before the *Praetor fideicommissarius* is mentioned in D. XXXII. 1 78. § 6.

Artemidorus (*Oneirocr.* IV. 80) tells us that 'Paulus the lawyer' dreamt when engaged in a suit before the emperor that Νίκων (*Victor* ?) was counsel with him, and hence felt sure, from the significance of the name, that he would win. But Nikon had failed once before in a suit before the emperor ; the dream was really ominous of failure, and failure accordingly ensued to Paulus. It seems probable that this is a story of our Paulus (Tzschirner *Z. R. G.* XII. 150 sqq.). In another case in which he was consulted we hear of an opinion of Ulpian's being adduced (D. XIX. 1. 1 43). He speaks frequently of '*Scaevola noster*', which probably implies that Scaevola was his teacher (cf. above pp. clxxv, clxxxvii). Epithets like *iuris peritissimus* (Lampr. *Alex.* 68) and *prudentissimus* (Gordian in Cod. v. 4. 1 6, Diocletian in Cod. IX. 22. 1 11) are of course applied to him.

As a writer he was exceedingly prolific. No less than 70 works of his are named in the Florentine Index, many of them with

similar titles to those of Ulpian. (One is named twice over.) His chief works were a commentary on the Edict in 80 books; *Quaestiones* in 26 books, *Responsa* in 23 books; *Brevia* in 23 books; and commentaries on Sabinus in 16 books, and on Plautius in 18 books. He also wrote four books on Vitellius (which Mommsen (*ad D. xxxii. 2. 1 78*) holds to have been in great part compiled by direct copying from Scaevola's *Responsa*, comparing *D. vii. 1. 1 50*; *xxviii. 2. 1 19*; *xxxii. 1 78. §§ 1, 2, 3*; *xxxiii. 4. 1 16*; *7. 1 18*; *xxxiv. 2. 1 32* with the passage of Scaevola referred to in his notes) and four books on Neratius, probably an edition of Neratius with notes. Some short notes of his on Papinian and Scaevola are found in the Digest (above pp. clxxxvii, cxevi), and one note on Marcellus' notes on Julian (*D. xv. 3. 1 14*). Further, he epitomized Alfenus Varus' Digest and Labeo's 'Probabilities,' neither of which abridgements are named in the Florentine Index. He also wrote 10 books *ad leges* (*Iul. et Pap. Popp.*), three *ad leg. Ael. Sentiam*, three on Trusts; *de censibus* (two books) *de iure fisci* (two books); *de officio Proconsulis* (two books) *de adulteriis* (three books); *Decreta* (three books), several manuals viz. *Regulae* in seven books, and also in one book; *Sententiae* six books and also five books; Institutes (two books) *Manualia* (three books). His 48 monographs are on all parts of the law, wills, codicils, inheritance, degrees of relationship and affinity, secret trusts, patronage, gifts of freedom, gifts between husband and wife, guardianships; several important statutes (*leges Cincia, Vellaea, Falcidia*) and senate's decrees (*Orfitianum, Tertullianum, Silanianum, &c.*); on interest and hypothec; on the duties of the captain of the watch, captain of the city, *praetor tutelaris*; on crimes and punishments, on public trials, on appeals, on actions, and on concurrent actions, on ignorance of fact and law, on unusual law (*de iure singulari*); &c.

There is little evidence as to the date of the composition. But of the more important treatises the *Decreta* were written under Severus and Caracalla's joint reign (A.D. 198—211) the *Sententiae* soon after Severus' death, the *Quaestiones* also under Caracalla, the earlier books of the *Responsa* under Elagabalus or Alexander and from the xivth book under Alexander. The commentaries on the Edict and on Sabinus offer few indications of date. Fitting thinks they were probably written before A.D. 206, as the extracts in *D. xxiv. 1* shew no knowledge of the *Oratio Severi et Antonini* named by Ulpian in *1 32*. The 70th book of the Edict-Commentary

contains a mention of Marcianus (D. VII. 9. 18), who also was apparently not an author till after Caracalla's death. So that unless we read *Maccianus*, as Fitting suggests, the work could not have been completed till much later. (See Mommsen *Z. R. G.* ix. p. 115, who also dissents from Fitting's notion (p. 25) that *noster* was used only of living persons.) He is cited in the Digest by Modestin v. 2. 1 9; xxvii. 1. 1 13. § 2 (who classes him with Papinian and Ulpian as a *κορυφαῖος τῶν νομικῶν*); and xxix. 5. 1 18; and by Macer xxxviii. 12. 1. 1; xlix. 4. 1 2. § 3; 16. 1 13. § 5.

A considerable part of the *Sententiae* has come down to us in the code of the Visigoths (see p. clxxiv), and other parts of it have been preserved in the *Collatio*, which has 28 extracts from it, besides 11 from other works of Paul. The *Consultatio* has also a few extracts. The Vatican Fragments have 70 or more extracts from Paul, chiefly from the *Responsa*, the *Manualia*, and the part of the commentary on the Edict relating to the *lex Cincia*. The recognition of the *Sententiae* by Constantine and Theodosius has been already mentioned, p. lxxxiv.

There are 2081 extracts from Paul in the Digest. These occupy about 268 pages of Hommel, or more than a sixth of the whole Digest. Only Ulpian was a larger contributor. No one else occupies 100 pages. The extracts from the commentary on the Edict occupy 92 or (with the commentary on that of the Curule Aediles) 94 pages; the Sabinus commentary 31 pages; the *Quaestiones* 29, and the *Responsa* over 19; the books *ad Plautium* 22 pages, and the *Sententiae* 15. Of the others none fills seven pages.

Although the number of extracts from Paul is not much less than from Ulpian, the quantity of matter is less than half. The fact is, Ulpian was generally taken as the basis and interpolated with short additions from Paul and Gaius. But long extracts from Paul are found e.g. D. II. 14. 1 27; IV. 8. 1 32; X. 2. 1 25; XVII. 1. 1 22; 2. 1 65, xxxv. 2. 1 11; xxxix. 2. 1 18; xli. 2. 1 1; 1 3; 3. 1 4; 4. 1 2; xlv. 1. 1 83; 1 91.



## CHAPTER XV.

## LATEST JURISTS.

CALLISTRATUS was the author of five works named in the Florentine Index: *de cognitionibus* in six books; *edictum monitorium* (six books); *de iure fisci* (four books); *Instituta* in three books, and *Quaestiones* in two books. The *de iure fisci* and *Quaestiones* may have been written under Severus; the *de cognitionibus* was written under Severus and Caracalla (Fitting).

The Digest contains 101 extracts from Callistratus. They fill 15 of Hommel's pages. All the works are represented, but there are nine pages from the *de cognitionibus* and three from the *Quaestiones*. Some of the longer extracts are D. XIV. 2. 1 4; XXII. 5. 1 3; XXVII. 1. 1 17; XLVIII. 10. 1 15; 19. 1 28; XLIX. 14. 11 1—3; L. 6. 1 6 (5).

Bremer infers from his frequent mention of the provinces that Callistratus wrote in some Greek town (*Die Rechtslehrer*, p. 97 sq.).

ARRIUS MENANDER is mentioned by Ulpian (Book XI. *ad edict.* D. IV. 4. 1 11. § 2) as being excused from a guardianship, because as councillor he was in attendance on the emperor (*circa principem occupatus*), probably the emperor Severus. The Florentine Index names one work *de re militari* in four books. The Digest has six extracts from it, viz. XL. 12. 1 29; XLIX. 16. 11 2, 4, 5, 6; 18. 1 1. They occupy about two of Hommel's pages. He is also cited by Macer in D. XXXVIII. 12. 1 1; XLVIII. 19. 1 14; XLIX. 16. 1 13. §§ 5, 6. The work was apparently written under Severus and Caracalla.

MARCIANUS (called in Just. IV. 3. § 1 *Aelius Marcianus*) is named in the Florentine Index as author of *Institutes* in 16 books, *Rules* in five books, two books on Appeals, two on *Publica* i.e. criminal trials, and single books on Informers (*de delatoribus*) and the action of Hypothec. The work on *Publica* is referred by Fitting to the time of Caracalla's sole reign; the Appeals were written after Severus' death; the others after Caracalla's death. A single book *ad S. Consultum Turpilianum* is not named in the Index, but a long extract occurs in D. XLVIII. 16. 1 1. There are 283 extracts from Marcian in the Digest. They fill more than 36 of Hommel's pages, those

from the Institutes filling 16, and the Rules and Hypothec about six each. The Institutes have been used also by Tribonian in compiling Justinian's Institutes, some of the passages being the same as extracts in the Digest. His notes on Papinian's work *de adulteriis* are twice given as separate extracts: D. xxiii. 2. 1 57a; xlviii. 5. 1 8.

Most of the extracts are short: but the work on hypothec has been extensively used in D. xx. e.g. 1. 11 5, 13, 16; 4. 1 12; 6. 11 5, 8. From the other works some of the longer passages are D. xxx. 1 114; xxxix. 4. 1 16 (which names a number of Eastern products liable to customs duties); xlviii. 10. 1 1; 16. 1 1; 21. 1 3; xlix. 14. 1 18; 1 22.

An *Aelius Marcianus* (hence perhaps the name given by the Institutes to our Marcian) is named as proconsul of Baetica in the time of Ant. Pius D. i. 6. 1 2 (called *Aurelius Marcianus* in *Collat.* iii. 3. § 1): a *Marcianus* is named as contemporary of M. Antoninus in D. iv. 2. 1 13; and rescripts are addressed *Marciano* in A.D. 223 (Cod. ii. 12 (13). 1 6), in 228 (Cod. vii. 21. 1 4) and 239 (Cod. iv. 21. 1 4). Possibly the last three were addressed to the jurist.

MACER (called *Aemilius Macer* in three places only, D. ii. 15. 1 13; xxviii. 1. 1 7; xxxv. 2. 1 68) appears in the Florentine Index as author of five works each in two books: *de re militari*; *publica iudicia*; *de officio praesidis*; *ad legem uicensimam hereditatum*; *de appellationibus*. The first four may have been written in Caracalla's time: the last belongs to that of Alexander Severus. There are 65 extracts in the Digest, they occupy 10 of Hommel's pages, most being from the *publica iudicia* and the *de appellationibus*. Of the longer passages are xxxv. 2. 1 68; xlii. 1. 1 63; xlix. 1. 1 4; 8. 1 1; 13; 16. 1 12; 1 13. Of these the first is especially interesting, because it gives the Roman rules for calculating the value of annuities (see below pp. 188—191).

FLORENTINUS, author, according to the Florentine Index, of Institutes in 12 books. The only clue to his time is that he refers to a constitution of Divus Pius (D. xli. 1. 1 16), and is said not to be quoted by any other jurist. In Cod. iii. 28. 1 8, vi. 30. 1 2 are constitutions of A.D. 223 addressed to Florentinus, but as in the second he is called *miles*, there seems no ground for connecting him with the author of the Institutes.

Florentin's Institutes furnish 42 extracts to the Digest, all short. The longest are xxix. 1. 1 24 containing a rescript of Trajan;

xxx. 1 116; XLVI. 4. 1 18, containing the form devised by Gallus Aquilius for a comprehensive release. A few extracts have been used for Justinian's Institutes also.

JULIUS AQUILA, called in the Florentine Index *Gallus Aquila*, probably from a confusion with Gallus Aquilius. He wrote a book of *Responsa*, from which two extracts of three lines each are given in the Digest, XXVI. 7. 1 34; 10. 1 12, both of which very possibly relate to the same case, and decide that a ward's slaves may be questioned where the ward's curator is suspected. A decree of Severus on this matter (D. XXVII. 3. 1 1. § 3) is by some taken as probably subsequent (Zimmern), by others as prior, to this decision (Rudorff). He is placed in the Florentine Index between Marcian and Modestin; and the Index is roughly chronological. A Julius Aquila *qui de Etrusca disciplina scripsit* is named by Pliny among his authorities for the second and eleventh books, but that is probably much too early an author to be the jurist.

LICINIUS RUFINUS was according to the Florentine Index author of Rules in 12 books. An extract from the 13th book is however given in the Digest (XLII. 1. 1 34). There are 16 other short extracts. He quotes Julian D. XXIII. 2. 1 51, and refers to Gallus Aquilius D. XXVIII. 5. 1 75 (74). But his date is fixed by an extract from Paul's book XII of *Quaestiones* (D. XL. 13. 1 4), in which his question to Paul and Paul's answer is given. Fitting holds the emperor Antoninus named in XXIV. 1. 1 41 to be Ant. Pius; Rudorff and Mommsen (*Z. R. G.* ix. 102) to be Caracalla.

HERENNIUS MODESTINUS was a pupil, or at least an admirer, of Ulpian, whom he wrote from Dalmatia to consult (above p. cxcix). He with others took part in the instruction of the younger Maximin (Capit. *Max.* 27) who was killed in A.D. 238. A constitution of Gordian's (Cod. III. 42. 1 5) in A.D. 239 mentions a *responsum* given by Modestin '*non contemnendae auctoritatis iurisconsultus*:' and an inscription (*Corp. I. L.* VI. p. 50, No. 266, Bruns p. 259) gives an account of a suit against the Fullers' Company, in which they claimed immunity from rates. The suit was decided in their favour by the *Praefecti Uigilum* at Rome, among whom Herennius Modestinus is mentioned. It was begun in A.D. 226 and decided A.D. 244. Modestin is mentioned by Arcadius Charisius in D. L. 4. 1 18. § 26,



who agrees that the character of certain municipal functions was *ut Herennius Modestinus et notando et disputando bene et optime ratione decrevit*.

Fifteen works by Modestin are named in the Florentine Index, of which the principal are *Responsa* in 19 books; *Pandekton* in 12 books; *Regulae* in 10 books; *Differentiae* in 9 books; *Excusationes* in 6 books, and Punishments in 4 books. The others are all single books, and relate to marriage, dowry, wills, legacies and trusts, manumissions and other subjects of less defined character. According to Fitting the *Differentiae*, *Pandekton*, and *Excusationes* were written after the death of Caracalla A.D. 218, the Rules and Punishments (except the last book of the Punishments) probably in Caracalla's time. The *Excusationes* (i.e. grounds for excusing guardians from the duty) was written in Greek but with quotations from other writers and laws in their original Latin. It forms an important part of one title in the Digest (xxvii. 1). The commencement of the work is preserved (l 1). Although the Vatican Fragments contain a chapter on this subject, Modestin is not quoted: perhaps because he wrote in Greek, and the work of which we have fragments was intended for the western empire (cf. Huschke *Iur. Antiq.* p. 698). Two short passages from Modestin's Rules and Differences are preserved independently of the Digest (Huschke l.c. p. 626). On D. xli. l. ll 53, 54, see under Q. MUCIUS (p. cviii).

In the Digest there are 344 extracts from Modestin. They occupy 40 of Hommel's pages, of which the *Responsa* fill 11, the *Excusationes* 8, the *Regulae* 6½, the *Pandekton* 5½, and the *Differentiae* 3½. All Modestin's works were dealt with by the Edictal Committee, and the extracts occur together, only Ulpian's work or works *de excusationibus* and *de off. pract. tutel.* being interspersed with Modestin's treatise on the same subject. The Latin extracts are generally short. The longer ones are xxvi. 7. l 32; xxxi. l 34; xxxviii. 10. l 4; xlix. 16. l 3; l. l. l 36.

ANTHUS or FURIUS ANTHIANUS, so called in the Florentine Index (where he stands last but two), wrote a work on the Edict, of which a part containing five books was handled by Justinian's Commissioners. From the first book three extracts, containing about 14 lines together, appear in the Digest ii. 14. l 62; iv. 4. l 40; vi. l. 180. All stand last in their respective titles. There is nothing to shew the time of his writing.

RUTILIUS MAXIMUS is named in the Florentine Index as author of one book on the Falcidian law. One extract of four lines is all that appears in the Digest (xxx. 1 125). Rudorff suggests that he is the same as the Maximus who is named in a mutilated Imperial rescript in Vat. Fr. § 113. In the Florentine Index he comes last but one.

HERMOGENIANUS, the last in the Florentine Index, was the author of *Iuris Epitomae* in six books. There are 107 extracts in the Digest. Being mostly short, they fill only  $9\frac{1}{2}$  of Hommel's pages. Of the longer are xxxvii. 14. 1 21; xxxix. 5. 1 33; xlix. 14. 1 46; l. 4. 1 1 (xxxvi. 1. 1 15 is by Cujas and Mommsen given to Ulpian). He is generally held to have written about A.D. 339 (Mommsen Vat. Frag. larger edit. p. 399; Fitting *Z. G. R.* xi. 450) from his extracts, as they stand, shewing an acquaintance with changes made by Constantine (e.g. compare D. iv. 4. 1 17 with Cod. Theod. xi. 30. 1 16; &c.).

Whether he was the author of the *Codex Hermogenianus*, a collection of rescripts apparently intended as an appendix to the *Codex Gregorianus*, is doubtful. It is said there were several persons of the name about that time.

ARCADIUS, called in the inscription to D. i. 11. 1 1 *Aurelius Arcadius Charisius, magister libellorum*, is named in the Florentine Index as author of three single books on Witnesses, on the office of the *Praefecti praetorio*, and on civil functions (*muneribus*). From the last is one long extract in D. l. 4. 1 18; from the second one extract forming D. i. 11; from the first are four extracts D. xxii. 5. 1 1; 1 21; 1 25; xlviii. 18. 1 10. Together they fill  $2\frac{1}{2}$  of Hommel's pages. He appears to be of the same age as Hermogenianus, and for the same reason: comp. D. i. 11. 1 1 with Cod. Theodos. l.c. He refers to Modestin in l. 4. 1 18. § 26.

## CHAPTER XVI.

OF LAWYERS' LATIN<sup>1</sup>.

SOME notice has been taken, in the course of the commentary on the title *de usufructu*, of certain usages and expressions which occurred in the text, but lawyers' Latin requires more general treatment. The subject has of course three sides, grammatical, lexicographical and rhetorical, and a full discussion would include careful distinction between the several lawyers as well as comparison with the lay writers of the period. The remarks which I shall make have no pretence to completeness, and deal only with some points, chiefly grammatical, which have caught my attention as at least unusual in classical Latin. The writers whom I regard here are mainly those used for the Digest. Neither the Theodosian nor the Justinian Codes come within my range.

The general style of lawyers' Latin before the middle of the third century *p. Chr.* is not studied and rhetorical, but rather the ordinary language of daily life and business among educated persons, loose in some respects, but from the requirements of the subject-matter brief and precise in others. On the whole it is simple, straightforward and pleasant; with numerous technical expressions, but free from pedantic tautology or circumlocution; frequently neat and compressed, but readily intelligible when the method and subject-matter are fairly familiar. The difficulties and obscurities, which we find, are due mainly at least to two causes. First, we seek to know more than the writer intended to say: we want answers on further points of law than were in contemplation either in the particular passages or even in the Digest at all; and doubt always arises when

<sup>1</sup> The only discussions of this subject that I am aware of are three. 1. Duker's *Opuscula varia de Latinitate Jurisconsultorum*, 1773. This book consists mainly of some criticisms by Valla with replies and comments by others. They relate chiefly to the distinction between so-called synonyms; and to the use of words by the lawyers for which there is little or no classical authority. I have scarcely found anything suitable for my purpose. 2. Brisson's *Parerga*, appended to his lexicon. This is a very painstaking collection of instances in the Florentine Digest of noticeable spellings, forms, words and phrases. Some of the instances are treated in Mommsen's edition as mere copyists' errors; others are now recognised as correct forms or spellings: of the remainder I have found some useful. 3. An interesting abridgment of a forthcoming paper by W. Kalb on the Latin of Gaius, contained in Wölfflin's *Archiv für latein. Lexicographie* i. 1. 1884. I have named Kalb on the points where I have been indebted to this paper.



interpretation is made the means of development. Secondly, to the character of the Digest as a hasty compilation, made in the manner described above (chapp. iv. v.), may reasonably be attributed much of the obscurity and uncertainty that is found.

The latter point has an especial bearing on the grammatical side of the matter. The only pure sources of law Latin are inscriptions and reported *formulae* on the one hand, and Gaius, the Vatican Fragments and some few other fragments on the other. The former are most important and interesting as specimens of the 'Curial style', i.e. the style of conveyancers, pleaders and Parliamentary draftsmen, but of course are stiff and meagre. The latter are juristic literature, and therefore more freely written and more suited to our purpose. But neither of Gaius nor of the Vatican Fragments have we more than one MS to rest on, though, fortunately, that is, in each case, an earlier, and so far a purer, source than we have in the case of most classical authors. The *lex Dei*, or *Collatio Mosaicarum ac Romanarum legum* rests on three MSS, but they are not good. Both Paul's *Sententiae* and Ulpian's *Regulae* are generally considered to have come to us only as abridged by some one of a much later age. The Digest, which alone is various enough to form a good basis for a study of juristic Latin, is difficult to trust in this matter. The combination of the copyist and corrector of the Florentine MS (see chap. xvii.) is fortunate as regards the text of Justinian's work, but this text itself is open to suspicion and something more. The writings of the Jurists have undergone manipulation, often of a rough and hasty character, from Greeks in a Greek-speaking country in the sixth century of our era, men who cared for law but not for the exactitude of their representation of the original authors, or for the niceties of style. The inference we should thence draw is supported by a comparison of Gaius' Institutes, and of the Jurists in the Vatican Fragments with the Digest. There is certainly more regularity of style about both the former than about many parts of the latter, while other parts leave little or nothing to desire. It is almost certain indeed that some *anacolutha* and the like are due to the scissors of the compilers, and accordingly I pass them over here (see notes on pp. 173, 192, 202, 249, &c.). Nor do I notice what are probably mere mistakes<sup>1</sup> of the copyists (noticed in Mommsen's edition).

<sup>1</sup> E.g. I do not believe that any Latin writer of this age would deliberately write *uix est ut legatarium uoluit dare* (D. xxx. 1 114. § 4), *uti exigeret et ea contentus erit* (xxxii. 1 37. § 4), *nemo dubitat quin non solet* (D. xxix. 2. 1 72); &c.

As compared with the language of Cicero and Quintilian the jurist Latin shews a development, in some respects reasonable enough, in others not unnatural but scarcely commendable. Of the uses of some forms and words we find previous instances in Plautus, Cato and Varro, who give us the language of common life, more than can be expected in the works of orators and rhetoricians. But the distinctive use of the indicative and subjunctive moods has somewhat lost its sharpness, and there is some vacillation in the use of primary and secondary tenses.

### Moods and Conjunctions.

1. Nothing shews this more clearly than the use of moods and tenses in the hypothetical cases which occur in infinite numbers in the Digest. Cicero in the *de Officiis* III. 23 (Lat. Gr. §§ 1532, 1533) puts a number of such cases and uses the future indicative and present, &c. subjunctive indiscriminately, but whichever he selects he adheres to in that sentence. In the Digest it is different: there is a greater range of variety, and these varieties are found jostling one another in the same sentence. This may be best shewn by the comparison of another chapter of Cicero, which in some respects resembles the cases put in the Digest.

Cic. *Off.* III. 24. §§ 92, 93. *Si quis medicamentum cuiquam dederit ad aquam intercutem pepigeritque, si eo medicamento sanus factus esset, ne illo medicamento unquam postea uteretur, si eo medicamento sanus factus sit et annis aliquot post inciderit in eundem morbum nec ab eo, quicum pepigerat, impetret ut iterum eo liceat uti, quid faciendum sit? Cum sit is inhumanus, qui non concedat, nec ei quicquam fiat iniuriæ, vitæ et salutis consulendum. Quid? si qui sapiens rogatus sit ab eo, qui eum heredem faciat, 'cum ei testamento sestertium milies relinquatur, ut ante quam hereditatem adeat, luce palam in foro saltet,' idque se facturum promiserit, quod aliter heredem eum scripturus ille non esset, faciat quod promiserit necne? Promisisse nollem et id arbitror fuisse gravitatis. Quoniam promisit, si saltare in foro turpe ducet, honestius mentietur, si ex hereditate nihil ceperit, quam si ceperit, nisi forte eam pecuniam in rei publicæ magnum aliquod tempus contulerit, ut vel saltare, quum patriæ consulturus sit, turpe non sit.*

Here in the first sentence we have the subjunctive selected for the hypothesis, but it is used consistently in the apodosis *faciendum*

*sit* as well as in the protasis *si dederit, pepigeritque...si factus sit...et inciderit nec impetret* (Cf. Lat. Gr. § 1532). The same is true of the third sentence. In the fifth sentence we have the future indicative selected, but it also is used consistently in the apodosis *mentietur* as well as in the protasis *si...ducet*. *Ceperit* and *contulerit* must here be taken as completed futures indicative (cf. Lat. Gr. § 1533).

Further the perfect subjunctives in the first and third sentences relate to time prior to the presents *impetret* and *faciat*. *Pepigerat* is pluperfect as relating to a time prior to *inciderit*, and indicative because it is in a relative clause defining the person already referred to as *quis*.

There is a difference in these two sentences in that the first has the imperfect *ne uteretur* following *pepigerit*; the third has the present *ut adeat* following the like tense *rogatus sit*. Both are allowable: the choice of the imperfect in the first sentence is due to the desire to distinguish between the time of the covenant and the time when the covenanted event occurs. The covenant was past: hence *si factus esset, ne uteretur*: the occurrence is subsequent and regarded only as prior to *impetret*. The third sentence is somewhat differently framed and the distinction is unnecessary.

(a) Now in the Digest the consistency, or, as I may call it, the uniformity of key, is often not preserved, e.g.,

*Si de me petisses, ut triclinium tibi sternerem et argentum ad ministerium praeberem, et fecero, deinde petisses ut idem sequenti die facerem, et, cum commodè argentum domi referre non possem, ibi hoc reliquero et perierit, qua actione agi possit et cuius esset periculum?* (D. XIII. 6. 15. § 14 Ulp.)

Here *petisses* and *fecero*, *petisses* and *reliquero*, are not consistent: and *possit* as apodosis is not well adjusted to the diverse protases.

*Si rem tuam, cum bona fide possiderem, pignori tibi dem ignoranti tuam esse, desino usucapere...Si rem pignori datam creditoris servus subripuerit, cum eam creditor possideret, non interpellabitur usucapio debitoris* (D. xli. 3. 1 33. §§ 5, 6 Jul.).

Here *possiderem* does not suit with *dem* in time, nor *dem* with *desino* in mood. *Subripuerit*, if taken as perf. subj., does not suit with *interpellabitur*, nor, if taken as completed future, with *possideret*.

*Si servum hereditarium heres, qui coactus adierit, iussisset adire hereditatem ab alio eidem servuo relictam, et tunc hereditatem, quam suspectam sibi esse dixerat, restituerit, an etiam eam hereditatem quae*



*per servum adquisita esset restituere deberet, quaesitum est* (D. xxxvi. l. 1 28. § 1 Jul.)

Here *iussisset* is subsequent in time to *adierit*, and *restituerit* is subsequent in time to, but coordinate in construction with, *iussisset*. *Dixerat* is similar to *pepigerat* in the passage of Cicero, and defines the inheritance as that first-named which he entered only by the prætor's order. The pluperfect subj. *iussisset* may perhaps, here and often, have been originally conceived as dependent on *quaesitum est*, but such a justification is also often absent.

Almost any page of the Digest will supply instances of harmony and disharmony in tenses and moods of these hypothetical cases.

(b) One special cause for a disharmony, real or apparent, is the fact that the apodosis is usually in the present or future indicative, whatever be the tense and mood of the protasis. The cases are regarded as merely subjects for a judgment of the law or for a prediction of the result of an action, and whether the supposed facts are regarded as occurring in the past, present, or future makes no difference: variety and fluctuation in statement are therefore not unnatural. The real grammatical protasis to such apodoses as *tenetur, tenebitur, dicendum est, erit, ualet, videbitur, cessat, liberabor*, &c. may be conceived to be a summary of the facts, in the form *si ita ut dixi res habet or habebit*.

(c) The variety of tenses and moods is very great. *Si mandat, si mandet, si mandabit, si mandaverit, si mandavit, si mandabat, si mandaret, si mandauerat, si mandasset* are all found without any practical difference in meaning<sup>1</sup>. The subjunctive is not specially employed to denote that the hypothesis is unreal, nor the indicative that it is real, nor do the imperfect and pluperfect subjunctives 'imply impossibility' (cf. Lat. Gr. § 1497), though there are cases where their use is normal. The tenses most frequently used are the forms in *-eri-* and the corresponding passives. Next to these come the present and pluperfect subjunctive and the perfect indicative. The imperfects indic. and subj. and the pluperfect indicative are, I think, the rarest.

(d) I fail to detect any difference in meaning or use in these sentences between *mandauero* and *mandauerim*, or between *mandatum sit* and *mandatum fuerit*. Compare D. xlvi. l. 1 42 (Jav.) *si*

<sup>1</sup> In English many in putting hypothetical cases would use *if he is, if he be, if he shall, if he should, if he was, if he were, if he has, if he had*, &c., without substantial difference of meaning.

*ita fideiussorem acceperō...non obligatur fideiussor; 1 43 (Pomp.) si fideiussorem te acceperim...confideiussores non erunt: x. 3. 1 4. § 4 (Ulp.). Eapropter scribit Iulianus, si missi in possessionem damni infecti simus et ante, quam possidere iuberemur, ego insulam fulsero, sumptum istum...consequi me non posse; &c. The first person most frequently ends in -ero (e.g. mandauero, stipulatus, or prohibitus fuero).*

(e) This tense or set of tenses usually seems to bear a future character, but it is qualified in subordinate clauses frequently by a past tense, less frequently by a present: viz.

Contemporaneous acts dependent on a sentence with -eri- are regularly, though not invariably, in the imperfect, preceding acts in the pluperfect.

A purpose with *ut*, and subsequent act with *antequam*, are usually expressed by the imperfect, though the present is not uncommon.

As illustrations may be taken:

*Si, cum decem mihi deberes, pepigero, ne a te uiginti...petam, in decem prodesse tibi pacti conuenti uel doli exceptionem placet. Item si, cum uiginti deberes, pepigerim ne decem petam, efficeretur per exceptionem mihi opponendam, ut tantum reliqua decem exigere debeam (D. II. 14. 1 27. § 5 Paul.).*

*Si liber homo, cum bona fide seruiret, mandauerit Titio ut redimeretur et...eam pecuniam dederit, quae erat ex peculio...ad bonae fidei emptorem pertinente, nullae ei mandari actiones possunt (D. XVII. 1. 1 8. § 5 Ulp.).*

*Si ei, cui damnatus ex causa fideiussoria fueram, heres postea exstitero, habeo mandati actionem (ib. 1 11 Pompon.).*

*Si ex pluribus heredibus unus, antequam ceteri adirent hereditatem, pecuniam quae sub poena debebatur a testatore omnem soluerit et hereditatem uendiderit nec a coheredibus suis propter egestatem eorum quicquam seruare poterit, cum emptore hereditatis recte experietur (D. XVIII. 4. 1 18. pr. Jul.).*

*Si quis, cum falso sibi legatum adscribi curasset, decesserit, id heredi quoque extorquendum est (D. XLVIII. 10. 1 4 Ulp.).*

*Si domino heres exstitero, qui non esset soluendo, cuius fundum tu mihi dare iussus esses, manebit tua obligatio (D. XXX. 1 108. § 6 Afric.).*

2. The indicative is found (of non-existent hypothetical cases), in sentences of comparison (Lat. Gr. § 1580) where in classical Latin we

should have the subjunctive, e.g. *perinde ex his causis atque si erant falsarii puniuntur* (D. XLVIII. 10. 1 1. § 4 Marcian.); *pro eo habebitur atque si aditus est qui adiri debuit* (XLIX. 5. 1 5. § 3 Ulp.); *non uideor uidelectus, qui deici non expectavi sed profugi. Aliter atque si, posteaquam armati ingressi sunt, tunc decessi* (IV. 2. 1 9. pr. Ulp.). (*Atque si* with subjunctive is frequent. Cf. Gai. III. 181 *unde fit ut, si legitimo iudicio debitum petiero, postea de eo ipso iure agere non possim...Aliter atque si imperio continente iudicio egerim.*)

3. *Cum* is frequently used both with indicative and subjunctive to introduce an hypothesis, and is practically the same as *si*.

*Cum mandatu alieno pro te fideiusserim, non possum aduersus te habere actionem mandati: sed si utriusque mandatum intuitus id fecerim, habebo mandati actionem* (D. XVII. 1. 1 21 Ulp.).

*Cum seruus extero se mandat emendum, nullum mandatum est* (ib. 1 54. pr. Pap.)

*Cum extaret impubes qui se filium defuncti diceret, debitoresque negent eum filium esse defuncti, et intestati hereditatem ad adgnatum qui forte trans mare aberit pertinere, necessarium erit puero Carbonianum edictum* (D. XXXVII. 10. 1 3. § 12 Ulp.).

4. *Cum* meaning 'since', is found in the Digest with the indicative, where classical Latin would have the subjunctive.

*Tutores, cum iudicatum persequi non potuerunt, periculo culpaenon subiciuntur* (D. XXVI. 7. 1 39. § 12 Pap.) where a particular case is referred to, not a general proposition affirmed.

*Inter bonorum uentrisque curatorem et curatorem furiosi itemque prodigi pupillius magna est differentia, quippe cum illis quidem rerum administratio, duobus autem superioribus sola custodia committitur* (ib. 1 48 Herm.); D. XLVIII. 10. 1 22. pr. (Paul); x. 1 5. 1 24. § 6 Ulp.

5. In dependent questions the indicative (as in other writers of the time) is often left; e.g. *Labeo distinguit cuius gratia uel heres instituitur uel legatum acceperit* (D. VII. 1. 1 21 Ulp.); *nec distinguimus unde cognitum eum habuit* (ib. 1 22); *quis ergo statuet qui potius manumittitur* (XL. 5. 1 24. § 17 Ulp.); *an autem illa repudianda est, considerandum est* (XXIV. 3. 1 22. § 7 Ulp.); XXXVII. 11. 1 10.

The use of the indicative after *forsitan* (e.g. D. III. 3. 1 43. pr. *forsitan et ipsi dantur*) is found in earlier lay writers. (Cf. Lat. Gr. § 17 67.)



6. With *licet* both indicative and subjunctive are found, e.g. *licet immineat* (D. vii. 1. 1 12. § 1); *licet sit* (ib. § 3); *licet amittatur* (§ 4); but *licet solebat* (1 9. § 7) all from the same book of Ulpian: *licet... datus est* (D. xxvii. 1. 1 21. § 2 Marcian); *licet fugitiua erat* (D. xxx. 1 84. § 10 Julian). So in other writers of the time and later. Koffmane *Gesch. d. Kirchenlat.* i. p. 132.

*Quamuis* with indic. e.g. D. xvi. 3. 1 1. § 18 Ulp., xxxviii. 2. 1 41. § 1 Paul. Cf. Lat. Gr. § 1627; Dräger *Hist. Synt.* § 566.

7. In subordinate clauses, where in classical Latin the subjunctive would be used to shew that the clause is part of a report or of a hypothetical case or of an infinitive sentence, the indicative is often found in the Digest. In many cases the indicative might be justified as subordinate to the principal verb and not to the infinitive or other clause, but there are so many instances where such an explanation would not hold, that we are forced to consider the use of the indicative as due to a neglect of the finer shades and distinctions of the language: e.g.

*Quod ideo placuisse Seruius scribit, quia spem reuertendi ciuibus in uirtute bellica magis quam in pace Romani esse uoluerunt* (D. xlix. 15. 1 12 Tryph.).

*Ait enim se propterea non teneri, quod pater eius dotem pro se dedit, cui heres non exstitit* (Vat. Fr. 94 Paul. The Digest xxiv. 3. 1 49. § 1 has *exstiterit* but retains *dedit*).

*Ipsa lege Papia significatur ut collegatarius coniunctus, si liberos habeat, potior sit heredibus, etiam si liberos habebunt* (Gai. ii. 207).

The present indicative is always found in the *Privileg. ueteran.* (Corp. I. L. iii. pp. 844 sqq. i.; instances in Bruns p. 196) e.g. *ueteranis ciuitatem dedit et conubium cum uxoribus, quas tunc habuissent cum est ciuitas eis data*. It will be observed in extenuation, that the time denoted by *cum est* is the time of *dedit*, though the clause is grammatically referable to *habuissent*.

8. Relative clauses, which might have either subjunctive or indicative, sometimes exhibit both coordinately, e.g. *excepto eo, qui... datus est, uel qui.. persequatur uel suscipit* (D. iii. 3. 18. § 2). *Adiuuantur in primis hi qui metus causa cepissent: ...succurritur etiam ei qui in uinculis fuisset: ei quoque succurritur qui in seruitute fuerit... item ei succurritur qui in potestate hostium fuit* (D. iv. 6. 11 2, 9, 11. 14 Callistr.).

9. The future passive infinitive is written in the Digest from the Florentine ms e.g. *restitutu iri* (xviii. 4. l 10); *praestatu iri* (ib. 1. l 66 pr.); *defensu iri* (xxxiii. 1 4. §§ 9, 10), &c. This form is not noted in Neue's *Formenlehre* II. p. 383 ed. 2. It appears to have arisen from forgetfulness of the fact, that the form in *-um* is a supine governing the supposed subject, *iri* being impersonal (Lat. Gr. § 1380). The passive meaning has suggested the use of what some Grammarians have called the passive supine. Moreover the concurrent use of such expressions as *optimum factum*, *optimum factu est* (cf. Kühner *Ausführ. Gr.* II. p. 538) might help towards the notion that *factum* and *factu* were much the same. The regular form in *-tum* (*-sum*) is also found, e.g. D. xix. 1. l 11. § 18 *praestatum iri*. But, as abbreviations were forbidden by Justinian and are not found in the Florentine ms, we cannot consider these forms in *-tu* to be merely abbreviations for forms in *-tum*.

10. An infinitive is sometimes found dependent on a gerund or gerundive : e.g. *Sabinus nullas praetoris partes esse ad compellendum defendere* (D. iii. 3. l 45 pr. Paul.); *quae supra diximus in procuratore non compellendo suscipere iudicium* (ib. l 17. § 2 Ulp.)

11. The verb of 'saying', 'thinking', &c., on which an infinitive clause depends is frequently omitted. This omission is probably sometimes due to the compilers, but it is not confined to the law writers, and in any case is too natural to require special justification in such writings. See D. vii. 1. l 73; iii. 3. l 14; l 45. pr.

12. *Quod* with a finite verb is sometimes used instead of an infinitive clause ; e.g. *Pater filio ita scripsit: scio quod...inuigilabis hereditati Lucii Titii* (D. xxix. 2. l 25. § 8 Ulp.); *potest dicere sperasse quod in testamento quoque gratus circa eum fieret* (D. xxxviii. 2. l 8. § 3 Ulp.); *si putat, quod utiliter actionem daturus sit, decernat* (xxxix. 2. l 15. § 28 Ulp.).

13. *Cur* for *quod* is sometimes found, e.g. *domini persona spectatur, qui sibi debet imputare, cur minori rem commisit* (D. iv. 4. l 3. § 11 Ulp.); *neque imputare ei possumus, cur non deseruit accusationem uel cur abolitionem non petierit* (xxxviii. 2. l 14. § 2 Ulp.); *Nam, et si mandassent, tenerentur tutelae, cur seruum pupillo necessarium non comparauerunt* (D. xvii. 1. l 8. § 4 Ulp.).

There are some instances of this in Cicero (after *accusare*) and in others. See Mayor on Plin. *Ep.* III. 5. § 16; Dräger *Hist. Synt.* II. p. 481 ed. 2.

*Quare* is similarly used D. XL. 5. l 55 Marcian.

14. *Quatenus* = *ut*, 'so that', e.g. *Pro eo qui in fuga esse dicitur, cautio ab eo extorquenda est, quatenus et persequatur et omnimodo eum restituat* (D. IV. 2. l 14. § 11 Ulp.); *licentiam habeat curator furiosae adire iudicem competentem, quatenus necessitas imponatur marito mulieris sustentationem sufferre* (xxiv. 3. l 22. § 8 Ulp.)

15. *Quam* is sometimes used without *magis* or *potius* or *tam* preceding, e.g. *pro herede autem gerere non esse facti quam animi* (D. xxix. 2. l 10. pr. Ulp.); *haec enim actio poenam et vindictam quam rei persecutionem continet* (ib. § 5); *cum posset non suscipere talem causam quam decipere* (D. xvi. 3. l 17. pr. Ulp.); xxx. l 49. § 5 Ulp.

This omission is also found in classical writers occasionally. See Dräger *Hist. Synt.* § 519. 2. d.

#### Use of Cases.

16. *Prouoco* is used with accusative of the judge to whom an appeal is made, e.g. *si multi sint debitores aut iudicem prouocent* (D. xxviii. 8. l 6 Gai.). So in the passive, e.g. *stultum est illud admonere, a principe appellare fas non esse, cum ipse sit, qui prouocatur* (D. xlix. 2. l 1. § 1 Ulp.) So also 3. l 1; 4. l 1. § 4, &c. Evidently the use of *appellare* has been transferred to *prouocare*.

On *condemnare aliquem aliquid* see Lat. Gr. § 1199.

17. *Contineri* is used with a dative; e.g. *utrum filii obligatio promissioni contineatur* (D. xxiii. 3. l 57 Jav.); *respondit rationum redendarum condicioni contineri omne quod*, &c. (xl. 5. l 41. § 11 Scaev.)

*Contrahere*, e.g. *cum essem tibi contracturus* (D. xvi. 1. l 8. § 14 Ulp.).

I have denied (pp. 192, 202) the use of *obscurare* and *impedire* with datives, contrary to their habit. But in such matters it is difficult to decide whether the fault is Tribonian's or the copyist's. In D. xlviii. 2. l 3 fin. (quoted by Schrader *ad Inst.* I. 7) we have *ei impedierit*, where either *eum* or the omission of *ei* is an easy correction. In *Inst.* I. 7 the better mss. have the dative; but comp. I. 6 init.

18. *Iubere* with dative and infinitive active is found, e.g. *si iussero filio uel seruo adire* (D. xxix. 2. l 26 Paul.); *si per epistulam*



*seruo pupilli tutor hereditatem adire iusserit* (ib. l 50 Mod.); though the accusative is more common. The dative with infin. is found in the Cod. Med. of Cic. *Att.* ix. 12. § 2, and in mss of Curt. v. 6. § 8, but is now corrected by the editors. In Liv. xxvii. 16. § 8 (according to the mss) we have *interroganti scribæ...deos iratos Tarentinis relinqui iussit*, but, even if the text is right and there is no anacoluthon, as if *respondens* or *respondit* were intended, the passive infinitive with a subject different from *scribæ* gives ground for a different construction (cf. Lat. Gr. §§ 1348, 1349 and note). Neither are Tacitus *Ann.* iv. 72 *tributum iis iusserat modicum*; xiii. 15 *Britannico iussit exsurgeret*; ib. 40 *quibus iusserat ut resisterent*, parallel to our instances. (In Liv. xlii. 28. § 1 *iussum* is due to conjecture; in Caes. *B. Civ.* iii. 98 the texts, which I have, all give accusative.)

19. On *noxæ dedere* see p. 132 ;

*his rebus recte præstari*, p. 69 ;

*accepto ferre*, p. 154, and Lat. Gr. ii. Praef. p. xxxvii ;

*doti* (predicative dative 'as a dowry') *esse* or *dare* ; *hypothecæ esse* or *dare*, *pigneris esse*, *accipere*, *dare* &c, Lat. Gr. pp. xlii, xlv, l.

20. The use of genitives to denote the 'matter charged' or the like is common in earlier writers as well as in the Digest. It has probably arisen from the ellipse of *nomine*, *crimine*, *iudicio*, &c. (Lat. Gr. §§ 1324—1327).

Hence *qui damni infecti cauere sibi postulat* (D. xxxix. 2. l 13. § 3 Ulp.); *damni infecti utiliter stipulari* (ib. § 8); *quamuis promississet damni infecti vicino* (ib. l 26); *damni infecti stipulatio* (l 18. pr. Paul.); *d. inf. actio* (l 33 Ulp.); &c.

So *aquæ pluviæ arcendæ agere*, *conueniri*, *teneri* (D. xxxix. 3. l 1. §§ 18, 20, 21 Ulp.).

*Si pater filii nemini iniuriarum agat* (D. iii. 3. l 39. § 4 Ulp.).

21. The action created by the *lex Aquilia* (see p. 99) is called in Cic. *Rosc. Com.* 11. § 32 *iudicium damni iniuriæ constitutum*. So ib. 18. § 54 *cum his contestata cum Flavio damni iniuriæ esset*. The full phrase was no doubt *damni iniuriæ dati*. In Gaius iii. 210; iv. 76 we have *damni iniuriæ actio*. In the Digest both phrases are used, e.g. *damni iniuriæ tenearis* (ix. 2. l 27. § 10; § 11; § 29; l 29. § 1); *damnum iniuriæ dare* (ib. l 27. § 17; l 29. § 7, &c.); but *damni iniuriæ actio* (ib. l 27. pr.; l 41. pr.). It is possible that *damni iniuriæ* may be an instance of the specification of a general notion by the addition

of another word, as *datus adsignatus* p. 34; or of the combination of the loss and the wrong, without a conjunction, like *uti frui*, &c. p. 27; but even if it was so understood, it is likely that the genitive arose from misunderstanding *iniuria* when *dati* was omitted. Cf. Cic. *Tull.* 17 § 41.

22. It is common to put a bare numeral, though indeclinable, to denote a sum of money, e.g. *si uiginti dederit*; *si iurauerit se decem daturum* (D. xxxv. 1. 1 26); even as price or value with verb or substantive, e.g. *seruus quinque ualens, cum uicarius ualeret decem* (xv. 1. 1 11. §§ 4, 5 Ulp.); *Stichus habet in peculio Pumphilum, qui est decem* (ib. 1 38. § 2 Ulp.); *faber mandatu amici sui emit seruum decem et fabricam docuit, deinde uendidit eum uiginti* (xvii. 1. 1 26. § 8 Paul.); *ex duabus stipulationibus una quindecim sub usuris maioribus, altera uiginti*, &c. (D. xlvi. 3. 1 89. § 2 Scaev.)

The money meant by the old lawyers was *sestertia* or *milia sestertium* (cf. Lat. Gr. i. p. 446). Cf. *si seruus decem milibus emptus, quinque milibus sit* (D. xxi. 2. 1 57 Paul.); *decem legata sunt; cogendus tota decem praestare* (xl. 5. 1 6 Paul.); *si cui legata sint centum* (ib. 1 7 Ulp.); *de fisco numerari decies centena dotis nomine iussit* (xxii. 1. 1 6 Pap.), for which sum we have the simple *decies* in xxxv. 1. 1 77. § 3 Pap. (*filiae decies restituere*). But Justinian may be supposed usually to understand *aureos*. For in transferring Gai. iii. 102 *si sestertia x a te dari stipuler et tu sestertia v promittas* to his own Institutes he writes (iii. 19. § 5) *si decem aureos a te dari stipulatur, tu quinque promittas*: and in amending the *lex Papia* he says (Inst. iii. 7. § 3; Cod. vi. 4. 1 4. § 9) that he shall put one *aureus* for 1000 sesterces in estimating the property of a deceased freedman (*si minores centenariis sint, id est, minus centum aureis habeant substantiam; sic enim legis Papiae summam interpretati sumus, ut pro mille sestertiis unus aureus computetur*). This was of course not merely a change of expression, but a large reduction of the amount, the *aureus* since Constantine's time being worth about 12s. 6d., and 1000 sesterces in the days of the Jurists being worth (say) £10 (taking a mean between the silver value, given by Marquardt *Staatsverw.* ii. p. 71, as 175 m. 41 pf., and the gold value given as 217 m. 52 pf.).

In D. xlviii. 14. § 1 (Mod.) *centum aureis cum infamia punitur*; l. 16. 1 88 (Cels.) *sic dicimus centies aureorum habere, qui tantum in praediis ceterisque similibus habeat*, the compilers have probably substi-

tuted *aureorum* for *HS*. Cf. Cujac. *Observ.* XIX. 31 = Vol. I. p. 869 ed. Prati.

23. The expressions *duumuir, duumuiiri* (plur.), *triumuir, triumuiiri, decemuir, &c.* are found in other Latin as much as in the lawyers, but they have a publicist character and are therefore not out of place here.

Prof. Nettleship (*Journal of Philology*, VI. p. 97, anno 1875) has suggested that *duum* and *trium* are neuter substantives, used as numerals and corresponding in form to Sanskrit *dvayām* and *trayām*, which he says are used at the end of compounds, as we might say *a pipe dozen for a dozen pipes*. According to this *duumuiiri* would be 'couple men', *triumuiiri* 'trio-men', and in the singular 'a couple-man; a trio-man'. I know of no such compound in Latin, and think there is a much simpler explanation of the phrase nearer home.

The origin of the expression is found in such sentences as these: *quod decemuirum sine prouocatione esset* (Cic. *R. P.* II. 36. § 71), 'because he was (one) of the ten men without appeal'; *alterum collegam tuum, xxuirum qui fuit ad agros diuidendos Campanos, uideo huc uenire* (Varr. *R. R.* I. 2. § 10); *cuius pater flamen aut augur aut quindecimuirum sacris faciundis aut septemuirum epulonum aut Sallius est* (Gell. I. 12. § 6 apparently quoting Labeo; cf. *ib.* III. 9. § 4; XIII. 12. § 6).

So in inscriptions: *C. Lucilius C. f. trium uirum cap.* i.e. 'one of the *tresuiri capitales*' (*Corp. I. L.* v. 872); *P. Babrinius M. f. duom uirum* (*ib.* 971); *P. Pactumeio P. f. Quir. Clementi x uirorum stlitibus iudicand.*, i.e. 'one of the decemviri for deciding suits' (*ib.* VIII. 7059). So in the *Mon. Ancy.* I. 45 where the Latin is mutilated, but the Greek is quite decisive.

In these inscriptions the partitive genitive is used as descriptive of the office. It differs from the use in Cicero, &c., in being attributed instead of predicated. The like use of oblique cases is found in the frequent *pro consule, pro quaestore, &c.*; *trib. pot.* or *tribunic. potestat.* for *tribuniciae potestatis*, or *tribunicia potestate*; and in *eq. pub.* on which see above, p. clxviii, note.

The next stage in the development is shewn in the numerous inscriptions which among other contractions omit the termination of the genitive plural, e.g. *neue quis iuiir. iiiiuiir. esto* (*lex Iul. munic.* 140); 'no one is to be (one) of the *duouiri* or *quattuoruiiri*'; *Cn.*



*Cornelius Cn. f. Scipio Hispanus, tr. mil. II. xuir. sl. iudik. xuir. sacr. fac.* i.e. 'twice tribune of the soldiers, one of the *decemuiiri litibus iudicandis*, one of the *decemuiiri sacris faciundis*' (*Corp. I. L. I.* 38); *L. Ateius M. f. Capito duomuir. quinq.* (ib. 1341). There is no reason for taking *xuir. &c.* of the former inscription as in any respect different from the *duomuir.* of the latter. All are abbreviations, for *duomuirum*, *decemuirum*, &c., but it is easy to see that a nominative (*duomuir*, *decemuir*) might be supposed to be found in each place: and there is no internal absurdity in supposing one member of a commission of two to be called *duomuir*, 'a man of two', whereas *duouir* would look like a contradiction in terms.

The third stage of the development is reached when these abbreviated forms are used, leaving the reader to supply any termination which suits the construction. Thus in *ni quis eorum...IIuir. IIIuir. aliamue quam potestatem...petito* (*Lex Iul. Mun.* 135) it is natural to read the words as *duomuiratum*, *triumuiratum*. Again *ex decreto IIuir. IIIuir. praefect. ue Mutinensis* (*Lex. Rubr.* 20) we understand genitives *duomuiiri*, *quattuoruiiri*, *praefectiue* (the *quattuor* being really a genitive plural just as much as the *duum*).

Hence it was taken that a commissioner was not described as *decemuirum*, but as *decemuir*, and Cicero writes *ut sibi iam decemuir designatus esse uideatur* (*Rull. II. 19. § 53*), whereas an inscription would have put *xuir. designat.*, meaning, at least originally, *decemuirum designatorum*. Thus compounds were supposed, and were used in any case required; e.g. *duumuir*, *duumuiro*, *duumuiiri* (nom. pl. e.g. *D. III. 4. 1 6*; *XLIV. 7. 1 35. § 1*) *seuir*, *octouir*, &c. Cf. *Hor. Sat. II. 5. 56 recoctus scriba ex quinqueuiro*. (See *Neue Formenlehre* I. pp. 440, 441.)

Corssen (*Ausspr.* I. p. 268) takes *duum* as a genitive dual, and explains *duumuiiri* as formed on the analogy of *duumuir*, but misses what seem to me the main elements of the formation of *duumuir* as well as *duumuiiri*, the attributive use of the genitive plural and the inscriptional contraction.

24. *Hoc amplius* 'besides', 'moreover', 'more than this' is a very common phrase in the Digest. What is *hoc*? Is it (α) nominative and accusative? (β) or ablative of measure, 'by this the more'? (γ) or ablative of standard of comparison, 'more than this'? In the case of (α) and (β) *hoc* would refer to what follows, in the case of (γ) to what precedes.

The phrase is found also in other than legal writers, e.g. Cic. *Phil.* XIII. 21. § 50 *Quae cum ita sint, de mandatis litterisque M. Lepidi viri clarissimi Seruilio assentior, et hoc amplius censeo, Magnum Pompeium...fecisse, &c.*; *Verr.* II. 50. § 123 *Agrigentini de senatu cooptando Scipionis leges antiquas habent, in quibus et illa eadem sancta sunt, et hoc amplius*; ‘*cum Agrigentinorum,*’ &c.; *Tull.* 19. § 44 *Fuit illud interdictum apud maiores nostros de vi, quod hodie quoque est*; ‘*Unde tu,*’ &c. Deinde additur illius iam hoc causa, quicum agitur, ‘*cum ille possideret,*’ et hoc amplius, ‘*quod nec vi nec clam nec precario possideret*’ (cf. *ib.* § 24 *nihil amplius...Quid ergo addit amplius?*). *Nat. Deor.* II. 12. § 34 *Bestiis natura sensum et motum dedit et cum quodam appetitu accessum ad res salutare, a pestiferis recessum*; hoc homini amplius, quod addidit rationem; (and comp. § 33 *quibus natura nihil tribuit amplius quam ut, &c.*) *Caecin.* 10. § 27; *Fin.* V. 4. § 11; *Fam.* IX. 25. § 1; *Brut.* I. 5. § 1 *Cui quum essem assensus, decreui hoc amplius<sup>1</sup>, ut tu, &c.*

Cato has the phrase several times; *R. R.* 57 *ubi vindemia facta erit, loram bibant menses tres; mense quarto heminas in dies, &c.*; hoc amplius *Saturnalibus et Compitalibus in singulos homines congios*; *ib.* 94 *Fici uti grossos teneant, facito omnia quo modo oleae, et hoc amplius, cum uer adpetet, terram adaggerato bene*; *ib.* 142; 157. § 10.

*Nepos Alc.* 11. § 2 *Namque ea, quae supra scripsimus, de eo praedicarunt atque hoc amplius: cum Athenis, &c., which is clear for a.*

*Sen. N. Q.* III. 15. § 1 *Quaedam ex istis sunt quibus adsentire possumus, sed hoc amplius censeo: placet, &c.* So also *Dial.* VII. 3. § 2.

*Quint.* I. 1. § 8 *De pueris, inter quos educabitur ille huic spei destinatus, idem quod de nutricibus dictum sit; de paedagogis hoc amplius, ut aut sint eruditi plene, &c.*

*Plin. Ep.* II. 11. § 19 *Consul censuit Mario urbe Italiaque interdendum, Marciano hoc amplius Africa.*

*Suet. Claud.* 11 *Parentibus inferias publicas et hoc amplius patri circenses annuos natali die*; *Jul.* 38 *Populo trecenos nummos quos pollicitus olim erat, uiritim diuisit, et hoc amplius centenos pro mora.*

Compare the use of *eo amplius*; *Calig.* 15 *inferias is annua religione publice instituit et eo amplius matri Circenses carpentumque;*

<sup>1</sup> Brisson (*de Formulis* II. 58, p. 168) quotes Dion. Hal. XIII. (?) μετὰ τοῦτον ἀναστὰς ἕτερος εἶπεν, ἐμοὶ δέ, ὧ βουλῇ, δοκεῖ καὶ τοῦτο ἐτι προσθῆναι τῇ γνώμῃ.

Sall. *Jug.* 80. § 6 *Denas uxores alii, alii plures habent, sed reges eo amplius.*

In the lawyers we have *hoc amplius, eo amplius; hoc minus, eo minus.* Instances of *hoc amplius* are numerous; e.g.

Gai. III. 127 *In eo quoque par omnium causa est, quod, si quid pro reo soluerint, eius recipiendi causa habent cum eo mandati iudicium; et hoc amplius sponsores ex lege Publilia propriam habent actionem depensi;* IV. 167 *fructus licitationis summam poenae nomine soluere et praeterea possessionem restituere iubetur, et hoc amplius fructus, quos interea percepit, reddit;* ib. 166 a.

Ulp. *Reg.* 15 *Hoc amplius mulier, praeter decimam, dotem capere potest legatam sibi.*

D. I. 7. 1 15. pr. Ulp. *si pater familias adoptatus sit, omnia quae eius fuerunt et adquiri possunt, tacito iure ad eum transeunt qui adoptavit: hoc amplius liberi eius qui in potestate sunt eum sequuntur;* III. 2. 1 2. pr.; 3. 1 8. pr.; VII. 8. 1 12. § 1 Ulp. *Nervia adicit stramentis et sarmentis etiam usurum, sed neque foliis neque oleo neque frumento neque frugibus usurum. Sed Sabinus et Cassius et Labeo et Proculus hoc amplius etiam ex his quae in fundo nascuntur, quod ad victum sibi suisque sufficiat, sumpturum et ex his quae Nervia negavit;* ib. § 2; *Edict. ap. D.* XXI. 1. 1 1. § 1 *ex his enim causis iudicium dabimus. Hoc amplius si quis aduersus ea sciens dolo malo uendisse dicetur, iudicium dabimus;* XXX. 1 19. pr.; 1 108. §§ 7, 8; XXXI. 1 32. § 2 *cum ita legatur 'illi hoc amplius fundum illum cum omnibus rebus quae in eodem fundo erunt', mancipia quoque continentur;* XXXII. 1 27. pr.; 1 29. § 3; 1 30. § 1 *respondi heredem teneri sinere frui; hoc amplius heredem mercedem quoque hortorum reipublicae praestaturum;* 1 54; 1 67; XXXIX. 2. 1 9. pr.; 1 15. § 31; XLI. 1. 1 9. § 7; 3. 1 33. § 1; XLII. 1. 1 15. § 11; § 12; XLVI. 8. 1 22. pr.; &c.

The following two instances are somewhat different; D. XXXII. 1 39. pr. *Pamphilo liberti hoc amplius, quam codicillis reliqui, dari uolo centum;* XLVII. 2. 1 62. § 5 *et quidem hoc amplius quam in superioribus causis seruandum.*

*Eo amplius* is used by the lawyers; Gai. II. 179 (referable to  $\gamma$ ); III. 212; Vat. Fr. 301 ( $\gamma$ , if *quod* be struck out as Mommsen proposes); D. XXVIII. 5. 1 86 ( $\beta$ ); XXXII. 1 8. § 2 *petiit testator ut quidquid ex bonis eius ad patrem peruenisset, filiae suae ita restitueret, ut eo amplius ( $\beta$ ) haberet, quam ex bonis patris habitura esset;* XXXIII. 1. 1 21. § 5 ( $\gamma$ ); XXXIV. 1. 1 18. § 3 ( $\gamma$ ).

*Hoc minus* 'so much less' ( $\beta$ ) is found D. XV. 1. 1 9. § 4; XXIV.



3. 1 15. § 1; 1 31. § 3; xxxvi. 1. 1 28. § 7; xxxvii. 6. 1 1. § 20; 10. 1 5. § 3; *Eo minus* in same sense in xxxvi. 1. 1 65. § 12.

It seems to me that in all the passages of Cicero (except perhaps *Fam.* ix. 25. § 1) *hoc* is (*a*) i.e. the nominative or accusative referring to the clause or fact following: and the same applies to Nepos, Seneca and Quintilian. In Cato, Pliny and Suetonius the expression wears a somewhat stereotyped air, meaning simply 'in addition', 'besides', and may have grown either from (*a*) or (*γ*).

The same applies to the use of *hoc amplius* in the lawyers, who seem sometimes to have one notion in their mind and sometimes the other. Not unfrequently e.g. D. iii. 3. 1 8. pr., 1 10 there is a climax ('more than this one'), but this may be due to the *et si* following. In the two passages where it is followed by *quam*, *hoc* seems clearly to be the accusative or nominative.

On the legal import of the phrase in some cases of bequest the lawyers were apparently not quite agreed. Compare Maecianus D. xxxii. 1 12, and Pomponius, ib. 1 54 with Africanus xxx. 1 108. § 7; and Cujas' note on the last passage (iv. p. 144, ed. Prati).

25. The use of *in* with accusative and ablative is sometimes reversed. Thus *manent in adoptionem* (Gai. ii. 136), *in libertatem tueri* (iii. 56); *in potestatem parentum liberos esse* (i. 55; &c. all which places Studemund corrects by omitting *m*); *in libertatis esse possessionem* (D. xl. 12. 1 41. Paul.) and many other places. A long list of passages is given by Böcking, Gaius p. 342, ed. 4 = 1st Excurs. ed. 5; also by Brisson *Lex. Parerg.* lxxii. p. 1387, ed. 1743; Sittl *Die local. Verschiedenheiten d. lat. Spr.* p. 128. Originally it was a mere blunder from the faint sound of the final *m*, but it grew into an idiom (it is found in Cic. and Liv.) and hence should not be altered by Studemund. Cf. Lat. Gr. § 1962, note.

The reverse mistake is seen in D. xxviii. 1. 1 12 Iul. *in hostium potestate non peruenissent* (where Mommsen reads *potestatem*); ib. 3. 1 6. § 7 *in carcere recipi* (where Mommsen suggests the like correction); *se in concubinato alterius tradere* (D. xxiii. 2. 1 11. Marcell.), and in other places given by Brisson l.c. lxxiii.

#### Omission of verb. *Genera uerbi.*

26. *Attinet* or *pertinet* is omitted sometimes in classical Latin in such expressions as *Uerum hoc nihil ad me* (Cic. *Or.* ii. 32. § 140). In the Digest it is often omitted after *quantum*, e.g. D. iii. 3. 1 33.

pr., Ulp. *Servum quoque et filium familias procuratorem posse habere aiunt; et quantum ad filium familias* ('as far as regards a son'), *uerum est*; xxviii. 3. 1 6. § 13. Ulp.; xxix. 2. 1 30. § 1. Ulp.; xli. 1. 1 11. Marcell.; xlii. 5. 1 4. Paul.; l. 1. 1 23. Hermog. and others quoted on vii. 1. 1 12. pr. (p. 80). So also with *quod*, e.g. D. xxvii. 3. 1 1. § 21. Ulp. *tutela actio, quod ad speciem istam, perempta est*; xlvii. 2. 1 46. Ulp.; xlviii. 10. 1 22. § 4.

27. Some deponent verbs are used as if passive: e.g. *arbitrari* D. xi. 7. 1 2. § 4. Ulp., and probably iv. 8. 1 27. § 4 bis; cf. note on vii. 1. 1 13. § 1. (p. 98); *contestari* D. ii. 12. 1 1. § 2. Ulp.; *mentiri* D. xlviii. 10. 1 28. Mod.; *complexus* D. xlix. 1. 1 3. § 1; *tueri* D. xxvii. 10. 1 7. pr. Jul.

On the other hand *abstentus* is used as a past participle of *abstinere* se (e.g. D. xxxvi. 4. 1 1. § 4. Ulp.) as well as passively of *abstinere* (D. xxvi. 8. 1. 21. Scaev.).

For *lauat* impers. and passive, see p. 115.

28. Böcking distinguishes between the use of *possidēre* to denote a state of possession and to denote the act of taking possession. He considers the former to be *possidēre*, the latter to be *possidēre*. Thus in D. xli. 2. 1 1. § 22; 1 2 he writes *municipes per se nihil possidēre possunt, quia universi consentire non possunt: sed hoc iure utimur ut et possidēre et usucapere municipes possint*. He has however doubts whether the first is *possidēre*. *Pand.* § 123, note 8. See also § 124 n. 25; § 132 n. 8, in which last place he seems to imply that *possidēre iussus* is the proper phrase. But in D. xlii. 4. 1 2. § 1; 1 7. § 1 we have *bona iubet possideri*, never, I think, *possidi*. Cf. §§ 5, 15, 17; 5. 1 12. § 2; 1 13 &c. Böcking refers to the Schneeberg edition of Forcellini's *Lexicon*: but all the instances of *possido* there given, chiefly perfect tenses, are so far as the form goes, capable of being instances of *possideo*, except *Lucr.* i. 386 which Munro treats as a *ἅπαξ λεγόμενον*. One instance indeed (*Bell. Alex.* 34 *possideri uastarique*) must be referred to *possideo*. The direct evidence appears to be strongly on the side of *possideo* against *possido*; and I see no theoretical difficulty in supposing *possideo* to be used of the first act of being in possession as well as of the subsequent state.

29. Gaius tells us (iv. 184) that after a summons into court, if the business could not be finished on that day, the defendant had to make an engagement for trial, i.e. to promise his appearance on a fixed

day. To make such an engagement was *uadimonium facere* (cf. Cic. *Quinct.* § 57). A formal promise was sometimes sufficient: sometimes sureties had to be given also. In Cicero *pro Quinct.* the plaintiff requiring such an engagement is said *uadari*: the defendant making it *uadimonium promittere* (§ 23; *Tull.* § 20); to put off the engagement for trial is *uadimonium differre* (*Quinct.* § 22); to keep the engagement *ad uadimonium uenire* (§§ 22, 48, 67); *uadimonium obire* (§ 53); to fail to keep the engagement *ad uadimonium non uenire*, *uadimonium deserere*, *non obire* §§ 52—57. *Uadimonium* is not named in the Digest: the like procedure remains, but this term is not used. The defendant *promisit se sisti*, i.e. promised for his own appearance (D. II. 11. 1 2. § 3; 1 8; 1 9); a person promising for another's appearance *promisit aliquem sisti* (ib. 1 7; 1 10. pr.; 1 11); the person thus making an appearance *se sistit* (ib. 1 2. § 3; 1 4. pr.), or *stat* (1 11. fin.), or in the past tense *stetit* (ib. 10. 1 1. § 3; 11. 1 2. § 1; 1 4. § 1. bis; § 3; 1 6; 1 11. bis); the surety who produces his principal, *sistit reum* (10. 1 2; 11. 1 11; 1 14); the person thus produced is said *sisti* (ib. 10. 1 3. pr. §§ 1, 2; 11. 1 11); or in the past tense *status esse* (ib. 5. 1 3; 11. 1 9; 1 14). The engagement for appearance is spoken of according to circumstances, as *cautio*, *stipulatio*, *promissio*, *iudicio sistendi causā* (e.g. 11. rubr.; 1 4. § 4; 5. § 1; 1 10. § 2) where *sistendi*, as is not uncommon with gerunds<sup>1</sup>, is used abstractly, so as to fit either an active or neuter sense (cf. Lat. Gr. II. Praef. pp. lxiv. sqq.). This is seen in D. II. 11. 1 6. Gai. *Si is qui fideiussorem dedit ideo non steterit, quod rei publicae causa absit, iniquum est fideiussorem ob alium necessitate sistendi obligatum esse, cum ipsi liberum esset non sistere*, i.e. if the defendant has a good reason for not making an appearance, the surety is excused from making him appear. *Sistere* is found in this neuter sense in 10. 1 3. pr. *quo minus quis in iudicium uocatus sistat*, unless it be a mistake for *sistatur*, which occurs in §§ 1 and 2 of the same law.

The use of *steti* of the defendant making an appearance has been strangely missed by the editors in Cic. *Quinct.* § 25. All the mss. have *Testificatur iste P. Quinctium non stetisse et stetisse se*. Hotoman suggested *stitisse*: Keller (*Semestr.* p. 218) approved, and Baiter, Kayser and Müller have naturally followed. As proof is quoted Gell. II. 14, where it is said that *uadimonium sistere*, not *stare*, is the right phrase, and that consequently in Cato *Quid si uadimonium*

<sup>1</sup> E.g. *abstinendi se* and *abstinendi* are found in D. XXIX. 2. 1 57. pr. (Gai.); XL. 5. 1 30. §§ 10, 11 (Ulp.).



*capite obuoluto stitisses?* is right, and a proposed emendation *stetisses* is wrong. It certainly is odd that none of these scholars noticed that *uadimonium* occurs in Gellius and of course requires the active verb *sistere*, perf. *stitisse*, whereas *uadimonium* is not in the passage of Cicero, and the middle or neuter is required, viz. *sisti* (or rarely *stare*), perf. *stetisse* (or *status esse*). If further instances are wanted besides those given above, see Gai. iv. 185 *ut qui non steterit, is protinus a recuperatoribus in summam uadimonii condemnatur*; D. xxxiv. 5. 1 13. (14) § 2. Jul. *Ita stipulamur, ueluti Stichum et Damam et Erotem sisti: si quis eorum non steterit, decem dari? necesse est enim omnes esse sistendos ut stipulationi satisfiat. Uel fingamus ita stipulationem factam si Stichum et Damam et Erotem non sisteris* (read with Haloander *stiteris*) *decem dari? neque enim dubitabimus quin aequae omnes sisti oporteat*; XLV. 1. 1 126. § 3. Paul. *si ita stipulatus fuero te sisti, et nisi steteris, aliquid dari, &c.*

### Technical phrases, Order of words, Pleonasm, &c.

30. A number of technical phrases were used so often that they became almost compounds, and from those used with verbs corresponding substantives were formed, e.g.

(a) *fide iubere, fide iussor, fideiussorius, fide iussio, confideiussio* (D. XLVI. 1. 1 39); *fide promissor, &c.* (Lat. Gr. § 1243); *fidei committere, fidei commissum, fidei commissarius; bona fide seruire, possidere, possideri, emere, bona fide possessor, emptor, seruiens, also bonae (malae) fidei possessor, emptor* (D. XLI. 1. 1 40; 1 48), *bonae fidei iudicium; manu mittere, manu missor; mortis causa capere, but mortis causa capio* (subst.) is only in the rubric of D. XXXIX. 6; *usu capere, usu capio* (subst.); *longo tempore capere, per longum tempus capio*, subst. (D. XLI. 1. 1 48); *noxae dedere, noxae deditio* (e.g. *ex causa noxae deditio* D. VI. 2. 1 5); *satis dare, satis datio; satis facere, satis factio; satis accipere, satis acceptio* (D. XLV. 1. 1 5. § 2).

(b) *proconsulatus* (Plin. Tac.) from *pro consule* is more of a regular compound: on this analogy we have *protutela* in Digest corresponding to *pro tutore*, as *tutela* does to *tutor*. From *decem primi* is formed *decemprimatus*.

(c) *quasi* is very frequently used to form a half compound; e.g. *quasi-dominus* (D. XLIII. 17. 1 3. § 7); *longa quasi-possessio; quasi-dos* (D. v. 3. 1 13. § 1); *quasi-senatoris filius, quasi-nepos-senatoris*

(D. i. 9. 1 7); *quasi-tutela* (D. xv. 1. 1 52. pr.); &c. See notes pp. 104, 113.

(d) *non* is similarly used: e.g. *idem est et si superficiariam insulam a non-domino bona fide emero* (D. vi. 2. 1 12. § 3. Paul.); *a diuersis non-dominis* (ib. 1 9. § 4. Ulp.); *neque igitur fratres consortes plurium loco habendi sunt neque non-fratres* (D. xxvii. 1. 1 31. § 4. Paul.); *interdum tamen et non-procuratori recte soluitur* (D. xlvi. 3. 1 12. § 1. Ulp.); &c.

### 31. Some phrases are used adjectivally or semi-adjectivally:

(a) prepositional phrases, e.g. *postulata est cognitio de in integrum restitutione* (D. iii. 3. 1 39. § 6. Ulp.); *per in iure cessionem* (Vat. Fr. § 47. Paul.); *per in rem actionem* (D. v. 3. 1 16. fin.); *in per uindicationem legato* (Gai. ii. 206); *per in manum conuentionem* (ib. iii. 14); *sine in manum conuentione* (Ulp. xxvi. § 7); *locus est de rato cautioni* (D. iii. 3. 1 39. § 1); *Carbonianum edictum aptatum est ad contra tabulas bonorum possessionem et intestati, cum et in secundum tabulas (possessione) in quibusdam casibus possit uideri necessarium edictum* (D. xxxvii. 10. 1 3. pr.); *de in rem uerso actio* (D. xv. 3).

Similarly *propter naturam metus-cause-actionis* (D. iv. 2. 1 12. § 2).

#### (b) Some phrases are used as little more than catch words:

So *do lego*, e.g. *ususfructus 'do lego' seruo legatus*, 'bequeathed in the words *do lego*' (see note p. 146). The interdicts are often denoted by the initial words, e.g. *tenetur interdicto 'quod ui aut clam'* (see note p. 100); *In interdicto 'unde ui'* (D. xlvi. 16. 1 6); *competere interdictum 'uti possidetis' placuit* (ib. 17. 1 3. § 3); so also *'iudicatum solui' stipulatione pro suo procuratore data* (D. iii. 3. 1 15); *ex 'iudicatum solui' stipulatione* (xlvi. 7. 1 16. Nerat.); *stipulatio 'ratam rem' interponi solet* (ib. 8. 1 10. Ulp.), the full phrase being *dominum ratam rem habiturum*.

So grants of possession: *nam et institutus secundum tabulas et ab intestato unde cognati et multo magis unde legitimi bonorum possessionem petere potuit* (D. xxxviii. 17. 1 1. § 5) where the spaced words all qualify *bonor. poss.* Actions, e.g. *sed an pater ex hac causa quod iussu teneatur uideamus; et puto ad omnes contractus quod iussu etiam referri* (D. xlvi. 1. 1 10. § 2) where *quod iussu* is short for the action so called; cf. D. xv. 4. 1 1. § 6 *quod iussu actio in eos datur*, &c.

*Ad communi diuidundo iudicium* (D. III. 3. 1 16. § 1); *per familiarie eriscundae iudicium* (x. 2. 1 2. pr.; see also notes pp. 48, 49) are scarcely removed from ordinary language.

32. For many technical phrases a particular order of the words was, if not invariably, at least usually, observed, e.g. *bonorum possessio*, *capitis deminutio*, *castrense peculium*, *dictio dotis*, *aduenticia dos*, *profecticia dos*, *in integrum restituere*, *in manum conuenire*, *legitima hereditas*, *legitima tutela*, *operis noui nuntiatio*, *patria potestas*, *pupillaris substitutio*, *suus heres*. Schilling, confirming this observation of Hugo's, shews that there are some instances of the reverse order (*Bemerkungen* p. 406). For a similar fixity of order in lay writers see Lat. Gr. § 1042: and the same in half-compounds, as *pater familias*, &c., §§ 979, 983. So *accepti latio*, *rati habitio*, &c.

33. *Causā* used prepositionally 'on account of', 'for the sake of', 'with a view to', is in all writers put after the genitive: as an ordinary substantive it is usually prefixed, e.g. *recepta est alia causa donationis quam dicimus honoris causā* (D. xxiv. 1. 1 42. Gai.). In D. vii. 1. 1 7. § 1 (see my note p. 56), *causā* is prefixed, perhaps because it does not mean 'with a view to apprehended damage', i.e. to the prevention of it, but 'on the ground of apprehended damage'.

Kalb points out that, when *ex* is used, Gaius puts the genitive between the preposition and *causa*, Ulpian persistently puts the genitive after *causa*, e.g. *ex uenditionis causa* (Gai. II. 20), *ex causa uenditionis* (Ulp. D. vi. 2. 1 14); *ex fideicommissi causa* (Gai. II. 253, 254), *ex causa fideicommissi* (Ulp. D. xxv. 3. 1 5. § 22; &c.).

34. The omission of a copulative particle is common in such phrases as *usus fructus*, *actiones empti uenditi*, &c., though it is not invariable (see note p. 27). And this omission is also found in naming authorities, even though only two are named, e.g. *Sabinus Cassius* (D. v. 1. 1 28; XII. 1. 1 31); *Nerua Atilicinus* (xvii. 1. 1 45); *Nerua Sabinus Cassius* (xviii. 1. 1 57); *Nerua Proculus* (xx. 4. 1 13); *Mela Fulcinus* (xxv. 2. 1 3. § 4); *Proculus Cassius* (xxxv. 1. 1 43); *Labeo Ofilius* (xl. 7. 1 39. § 1); &c.

In laws a similar omission in the combination of tenses is frequent, e.g. *nisi quod...oportet oportebit* (*Lex Anton.* 5 = Bruns p. 87); *quae uiuae propius urbem Romam sunt erunt* (*lex Iul. mun.*



7 = Bruns p. 96); *quod aduersus eam legem fecit fecerit, condemnatus est erit* (ib. 25); *quiue in senatu dixit dixerit* (*Lex Cornel.* ap. Cic. *Clu.* 54. § 148); *qui heredem fecit fecerit* (cf. Cic. *Uerr.* i. 41—43); *quo ea uia idue iter deterius sit fiat* (*Ed. Praet.* ap. D. XLIII. 8. 1 2. § 20); *quam pecuniam L. Titius L. Baianio dedit dederit, credidit crediderit, expensum tulit tulerit, &c.* (Agreement ap. Bruns p. 200.)

Similarly *suos heredes accipere debemus filios filias, siue naturales siue adoptiuos* (D. XXXVIII. 16. 1 1. § 2. Ulp.); *libertis libertabus, oftener libertis libertabusque* (Wilmanns' Index p. 684); *in liberos libertasue suos suas paternos paternas, qui quae in ciuitatem Romanam non uenerint* (*Lex Salpens.* XXIII. = Bruns p. 131). But we have also *quos quasue manumisi manumiseroue...filios filiasue, &c.* (D. XXXII. 1 37. § 7.)

Similarly *quae praedia donationis causa tradidi, cessi,...per te non fieri, quominus reddantur, restituantur* (D. XXXII. 1 37. § 3).

35. Repetition of the substantive in relative and demonstrative clauses is found in lay writers, but perhaps there is an imitation of the legal style. In Gaius we have *eam aetatem esse spectandam, cuius aetatis puberes fiunt* (i. 196); *bona uero Latinorum pro ea parte pertinent, pro qua parte quisque eorum dominus sit* (III. 59); *aut calatis comitiis testamentum faciebant, quae comitia bis in anno, &c.* (II. 101), &c. (More instances in Kalb, p. 84.)

Kalb also points out that Gaius regularly uses *quatenus* after *ea tenus*, e.g. *Inst.* III. 161 *eatenus cum eo habeo mandati actionem, quatenus mea interest implere eum mandatum*; D. IV. 2. 1 19; 3. 1 26; 4. 1 27. § 1; XIV. 3. 1 10; 5. 1 1. So also other Jurists, e.g. Proculus, D. XVIII. 1. 1 69, &c. Ulpian very frequently has *quatenus* after *hactenus*, e.g. II. 14. 1 49, *si quis hactenus desideret conueniri, quatenus facultates patiuntur*; VIII. 5. 1 8. § 5; XVIII. 4. 1 2. § 3; &c.

A repetition of the substantive with the demonstrative is found in Gai. i. 29; 32 *si nauem marinam aedificauerint...eaeque navis...portauerit*. In both places of Gaius the words are apparently copied from a law or senate's decree. D. VI. 2. 1 11. § 4 (Ulp. from Julian) *ex qua causa...ex ea causa*; ib. 1 13. pr. (Gai.); *id senatus consulto demonstratum est, quo senatus consulto comprehensum est* (XL. 5. 1 22. § 2. Pap.); *qua in re...in ea re* (Cic. *Tull.* 11. § 27): and see Lat. Gr. § 1002. The extent to which this kind of repetition was carried in laws may be readily seen in Bruns' *Fontes* (passim), e.g. *quem quomque*

*ante suum aedificium viam publicam h(ac) l(eg)e tueri oportebit, qui eorum eam viam arbitrato eius aedilis, quovis oportuerit, non tuetur, eam viam aedilis, quovis arbitrato eam tueri oportuerit, tuendam locato; isque aedilis diebus ne minus x, antequam locet, apud forum ante tribunale suum propositum habeto, quam viam tuendam et quo die locaturus sit et quorum ante aedificium ea via sit; &c. (Lex Iulia munic. § 10: Bruns p. 97 ed. 4).*

*Quos pontifices quosque augures C. Caesar, quive iussu eius coloniam deduxerit fecerit ex colonia Genetiva, ei pontifices eique augures coloniae Genetivae Iuliae sunt, eique pontifices auguresque in pontificum augurum conlegio in ea colonia sunt, ita uti qui optima lege optumo iure in quaque colonia pontifices augures sunt erunt (Lex Ursonens, § 66: Bruns p. 113).*

36. The repeated prefixing of relative clauses, shewn also in the last extracts, is very common in laws. A good instance is the following:

*Quae colonia hac lege deducta quodue municipium praefectura forum concilliabulum constitutum erit, qui ager intra fines eorum erit, qui termini in eo agro statuti erunt, quo in loco terminus non stabit, in eo loco is, cuius is ager erit, terminum restituendum curato, uti quod recte factum esse uolet (Lex Mamilia, Grom. ed. Lachm. p. 263), i.e. 'it is the duty of the owner of any piece of ground within the territory of any colony established under this law to restore any boundary stone which shall have been set up in that territory and shall be missing in that piece of land'.*

### Uses of Particles and Pronouns.

37. *Nec* is very frequently used for *non* or *ne...quidem*, e.g. *non quasi adempta, sed quasi nec data* (D. xxviii. 4. 1 1. § 4. Ulp.); *libertinus nullo modo patri heres fieri possit, qui nec patrem habuisse videtur* (Ulp. Reg. xii. § 3); *ut quemadmodum incipere alias non possunt, ita nec remaneant* (D. xlv. 1. 1 71. pr. Paul.); *non quasi precario usum sed quasi nec usum* (D. xliii. 1. 1 1. § 6. Ulp.); *si in metallum datus in integrum restitutus sit, perinde ac si nec damnatus fuisset, ad munera vel honores uocatur* (D. l. 4. 1 3. § 2. Ulp.); *senatores hanc vacationem habere non possunt, quod nec habere illis naum ex lege Iulia repetundarum licet* (D. l. 5. 1 3. Scaev.); *qua ratione nec emancipando filium peculium ei aufert, quod nec in familia retento*

*potest auferre* (D. XLIX. 17. 1 12. Pap.): &c. Kalb says, Gaius uses *nec*, as a mere negative, only in the phrases *nec mancipi* and *furtum nec manifestum*. The usage is found in Seneca, Martial, Quintilian, &c., see Lat. Gr. § 2232; Dräger, *Hist. Synt.* II. 73 ed. 2; and Halm's Index to Minucius Felix.

Kalb says that in coordinated clauses Gaius almost always uses *neque...neque*, not *nec...nec*. (In IV. 150 *nec ui nec clam nec precario* is an old formula.)

38. The use of *ne quidem* together and prefixed to the emphatic word is certainly frequent in the lawyers, though not perhaps peculiar to them. (Koffmane *Gesch. d. Kirchenlat.* p. 136 quotes Faustin. *lib. prec.* 2.) See my note on p. 126 and add to the references there given Gai. II. 218; D. XXIII. 2. 1 60. § 5. Paul.; XXV. 2. 1 1. Paul.; XXX. 1 114. § 11. Marcian.; XL. 1. 1 8. § 3. Marcian.; XLIV. 7. 1 58. (59) Licin. Ruf.; XLVIII. 18. 1 1. § 5. Ulp.; 19. 1 9. § 3. Ulp.; L. 2. 1 12. Callistr.; 6. 1 6. § 12. Callistr.

So also *non quidem*: e.g. *non quidem ad agendum sed ad administrandum* (D. III. 3. 1 43. Paul.). So also Curt. III. 11. § 10; Sen. *Ir.* II. 10. § 3. *Et quidem* (e.g. D. XXIX. 2. 1 42. pr. Ulp. *et quidem impune*) is common in lay writers: see Lat. Gr. § 1623.

39. *Ceterum* = *alioquin*: *Quod circumspicte erit faciendum: ceterum nemo accedet ad emptionem rerum pupillarum* (D. IV. 4. 1 7. § 8. Ulp.); *quod sic accipiendum, si non dolus ipsorum interveniat: ceterum cessabit restitutio* (ib. 1 9. § 8. Ulp.). So XXXVII. 10. 1 5. § 4. Ulp. Other instances in Klotz *Lex. s. v.* In the ordinary use of *ceterum* the other alternative is explicitly set out, e.g. *sed haec ita, si mandato domini procurator egit: ceterum, si mandatum non est*, &c. (D. III. 3. 1 27. pr. Ulp.); *sed hoc post litem contestatam: ceterum ante iudicium acceptum non decipit actorem qui se negat possidere* (VI. 1. 1 25. Ulp.); *ceterum aliter observantibus* 'if a different view were taken' *futurum*, &c. (XLIII. 8. 1 2. § 28. Nerua ap. Ulp.).

40. *Suus* is used not merely as a reflexive pronoun, i.e. as referring to the person who is the subject of the sentence, or at least the subject of the discourse (Lat. Gr. §§ 2262—2270). It is used technically of a man's own heirs, i.e. of the children in his power (D. XXXVIII. 16. 1 1. § 2), *suus heres, sui heredes* (see note, p. 226). In this use *suus* precedes *heres*.



*Pro suo* (D. xli. 10) was used technically where *pro meo*, &c. would be more natural, e.g. *Donata uel legata uel pro donato uel pro legato etiam pro suo possideo* (D. xli. 10. 1 l. pr. where indeed strict construction would require the plural *pro meis*; *pro meo possideo* follows just after).

(*Inter se* is becoming technical in Minuc. Fel. 18. § 1 *inter se... singuli dissimiles inuenimur*. Cf. Sittl *Die loc. Versch. d. lat. Spr.* 1882, p. 115.)

For such uses as *suis nummis hominem emi* (D. ii. 4. 1 10. pr.), where *suis* refers to *hominem*, there are classical parallels. Cf. Lat. Gr. § 1265. Cf. D. xxxiii. 10. 1 7. § 2 *non tamen a Seruio dissentio, non uideri quemquam dixisse, cuius non suo nomine usus sit*, where *suo* refers to *cuius* 'that of which he has not used the proper name' cf. notes, p. 225.

41. On *perinde* and *proinde* see notes, p. 149.

*puta, ut puta*, ib. p. 55.

*quisque* attracted into the case of *suus* (e.g. *sua quaque die* D. xiii. 7. 1 8. § 3; *Tab. Baet.* ap. Bruns p. 200), see Lat. Gr. § 2288.

### Formation of inflexions and words.

42. Some unusual forms are found which are probably not due to the copyists or to the compilers, but to a corruption or forgetfulness of the proper form, e.g. *praestauimus* (D. iii. 5. 1 18. § 4. Paul.); *praestauit* (v. 3. 1 36. § 1. Paul.); *praestarim* (xxii. 1. 1 37. Ulp.). So also *praestatu* D. xviii. 1. 1 66. Pomp.; xix. 1. 1 11. § 18. Ulp.

Also *accederat* (D. xxix. 2. 1 99. Pomp.), for which Mommsen reads *accesserat*; *adpulserit* (xliii. 20. 1 1. § 18. Ulp.); *expulsisse* (l. 17. 1 18. Pomp.).

*domu* (abl.) is found frequently in the Digest, e.g. vii. 4. 1 22; xix. 2. 1 60. pr.; *Edict.* ap. xxv. 4. 1 1. § 10. It is also found in Plaut. *Mil.* 126 and in some inscriptions (*Neue Formenlehre* i. p. 520 ed. 2).

43. Stems in *-torio-* (*-sorio-*) are in very frequent use by the lawyers, some being words of ordinary life, others formed for technical expressions. I have noted the following: *absolutorius*, *adiutorium*, *aestimatoria* (*actio*), *amatorius*, *ambulatorius*, *aratorius*, *adessorium*, *auditorium*, *balneatorius*, *captatorius*, *cenatorius*, *cen-*

*sorius*, *cocinatorius*, *cognitorius*, *collusorie*, *commissoria* (*lex*), *confessoria* (*actio*), *constitutoria* (*actio*), *contestatorius*, *coopertorium*, *defunctorie*, *delatorius*, *derisorius*, *derogatorius*, *deuersorium*, *dilatatoria* (*exceptio*), *dimissoriae* (*litterae*), *dormitorius*, *ereptorius*, *exceptorius*, *excluserius*, *exercitoria* (*actio*), *exhibitorium* (*interdictum*), *fideiussorius*, *fraudatorium* (*int.*), *frustratorius*, *indutorius*, *institoria* (*actio*), *interrogatoria* (*actio*), *interusorium*, *iuratorius*, *lusorius*, *mandatorius*, *meritorium*, *messorius*, *moratorius*, *negatoria* (*actio*), *notoria*, *nugatorius*, *obligatorius*, *olitorius*, *peremptorius*, *petitorius*, *pictorius*, *piscatorius*, *pistorius*, *portorium*, *possessorius*, *potorius*, *praeparatorius*, *praetorius*, *procuratorius*, *prohibitorius*, *putatorius*, *quaestorius*, *recuperatorius*, *redhibitoria* (*actio*), *repositorium*, *rescissoria* (*actio*), *restitutorius*, *sectorium* (*interdictum*), *secutorium* (*iudicium*), *senatorius*, *signatorius*, *stratorius*, *successorius*, *tectorius*, *territorium*, *tributorius*, *tutorius*, *uenatorius*, *uiatorius*, *uindemiatorius*, *uxorius*.

The list might be greatly increased, if the Codes were included.

Stems in *-ario-* are twice as numerous (over 150), but they are not so largely legal. Some however have this aspect: e.g. *arbitraria* (*actio*), *compromissarius*, *depositarius*, *fideicommissarius*, *fiduciarius*, *fructuarius*, *hereditarius*, *honorarius*, *hypothecarius*, *iudiciarius*, *legatarius*, *collegatarius*, *partiaris*, *peculiaris*, *privilegiarius*, *propriarius*, *sequestrarius*, *superficiarius*, *testamentarius*, *triticiaria* (*condictio*), *uenaliciarius*, *usuarius*, *usufructuarius*, *usurarius*.

44. Adverbs in *-ter* are also very freely formed. I have noted these, many however being in common use elsewhere. Indeed, this formation is rather a prevalent use of the time than specially of the lawyers: *acriter*, *aequaliter*, *aliter*, *atrociter*, *audacter*, *audenter*, *breviter*, *civiliter*, *clementer*, *communiter*, *competenter*, *condicionaliter*, *congruenter*, *consequenter*, *constanter*, *continenter*, *convenienter*, *corporaliter*, *criminaliter*, *difficiliter*, *diligenter*, *dissimiliter*, *dupliciter*, *efficaciter*, *elegant*, *evidenter*, *fataliter*, *fauorabiliter*, *feliciter*, *fideliter*, *fortiter*, *fraudulenter*, *frequenter*, *frugaliter*, *generaliter*, *grauiter*, *habiliter*, *immutabiliter*, *impersonaliter*, *impotenter*, *imprudenter*, *inaequaliter*, *inciviliter*, *inconsideranter*, *incunctanter*, *indifferent*, *indubitanter*, *inefficaciter*, *inelegant*, *infauorabiliter*, *instant*, *inutiliter*, *largiter*, *leniter*, *leuiter*, *libenter*, *liberaliter*, *licenter*, *mediocriter*, *militariter*, *naturaliter*, *neglegenter*, *notabiliter*, *patienter*, *peculiariter*, *pecuniariter*, *peruicaciter*, *petulanter*, *principaliter*, *prudenter*, *quadrifariter*, *qualiter*, *qualiterqualiter*, *regulariter*, *salubriter*,

*sapienter, segniter, similiter, simpliciter, singulariter, solenniter, specialiter, subtiliter, sufficienter, turpiter, uehementer, uigilanter, uiolenter, uniuersaliter, utiliter.*

45. The formation of verbs from adjectives of the comparative degree is noticeable: e.g. *certiorare* (D. xii. 4. l 5. § 1 and often); *meliorare* (vii. 1. l 13. § 5); *minoratus* (xviii. 7. l 10); *peiorare* (Paul *Sent.* ii. 18. § 1, but see Krüger *ad loc.*).

## CHAPTER XVII.

### AUTHORITIES FOR TEXT OF DIGEST.

FORTUNE has favoured the great work of Justinian. The multitude of MSS. which are found at the present day, containing the whole or part of the Digest, is no indication of the chances of its having been lost. The great mass of them, indeed almost all, have been directly or indirectly copied from one MS. still existing at Florence, and have been written since the tenth or eleventh century; so that with slight qualifications it may be said the line of authentic knowledge of the words of the Digest consists of a single thread. An accident in the ninth or tenth century might have destroyed any authentic knowledge of the bulk of Roman law.

The examination and criticism of MSS. have been conducted of late years so much more thoroughly, and on such improved methods, due to a clearer comprehension of the problem, that it would be a matter of very great regret if the Digest had not been edited critically by some competent philologist of the present or recent times. Happily this task has been admirably performed by the scholar best fitted for it. Th. Mommsen's edition (in 2 vols 4to., Berolini, 1870) is founded on a new collation of the Florentine MS. made by Ad. Kiessling and Aug. Reifferscheid, which has been verified in all doubtful passages by P. Krüger, R. Schöll, and others, so as to leave now no doubt as to the reading of the original scribe, or of the correctors of it. And Mommsen has made such an examination and selection of other MSS. as to enable their value, or, as it may almost be said, their general worthlessness, to be ascertained. The account I proceed to give of the authorities for the text of the Digest rests mainly on Mommsen's Preface to this edition.



The Florentine ms. was at Pisa in the middle of the twelfth century, and its preservation was carefully provided for in the statutes of that city, dated 1284. Whence or when it came there is not known. It has been said that it came there from Constantinople: it has also been said that the Pisans carried it home as booty after the capture of Amalfi: but there is no sufficient authority for either statement. The Florentines on their conquest of Pisa in 1406 carried it off with other booty to Florence, where it was kept in the public treasury in the Old Palace till 1786, when it was transferred to the Laurentian Library. The ms. is in two volumes, of which the first contains 441 leaves, the second 465. One (additional) leaf containing the Greek constitution *Δέδοκεν* has been lost from the first volume, but it was copied in the sixteenth century. Each leaf is written on both in front and back and (excepting the three Latin prefatory constitutions) in two columns. Each column contains 44 or 45 lines, the lines containing a various number of letters, according to Mommsen's estimate from 27 to 38, i.e. an average of about 32. The size of each leaf is about  $14\frac{1}{2}$  in. high, and  $12\frac{1}{2}$  in. wide: each column of writing is 10 in. long, and nearly  $4\frac{1}{2}$  in. wide. Twelve scribes have been employed on the ms., of whom ten have written the Digest proper, the prefatory constitutions being written by two others. The letters are all uncial, about  $\frac{1}{8}$  of an inch high, of a plain rounded character. There is as a rule no space or interpunctuation between the words. Each extract<sup>1</sup> commences a new line, one letter usually projecting, and there is usually a colon at the end of the extract; and sometimes a point or empty space after the name of the authors and before the commencement of a new clause. Marks similar to our own inverted commas are usually put where the words of laws or of the edict are quoted. No numbers or abbreviations are found, unless some ligatures of letters at the end of a line are considered such. The inscriptions and subscriptions of the several books, the titles (*rubricae*) and the names of the authors of the extracts (occasionally, by mistake as it seems, the following word also) are with few exceptions in red paint.

The ms. was executed in the sixth or seventh century by Greeks, and, probably at the same time and place, was corrected by two other Greeks, the first correcting Books i.—xviii., or thereabouts,

<sup>1</sup> i.e. what was taken by the scribe for a separate extract: but there are not a few instances of extracts being improperly divided and of others improperly united (Mommsen *Praef.* p. xxxiii.).

the second correcting the remaining books. For our purposes they may be treated as one. It is due to this correction that the work, as we read it, is pretty free from gross copyist errors. Whether the corrector had the identical copy before him, which the original scribes had, or another copy is not certain. There are appearances which speak for either theory. Mommsen inclines to the opinion that the corrector had a different copy before him.

There is no other MS. of any considerable portion of the Digest, which can be put on the same plane of evidence as an independent authority. But there are MSS. of small parts which are invaluable because they are independent. Four leaves of a Naples palimpsest, of about the same age as the Florentine MS. contain x. 2. 1 3. fin.—1 16. pr.; 3. 1 23. fin.—1 29. pr. med.; 4. 1 12. fin.—1 19. Seven fragments of papyrus in Count Schönborn's library at Pommersfeld near Bamberg, of similar age, have preserved some broken bits of XLV. 1. 11 35—73. Both these are copied out in the Appendix to Mommsen's first vol., and a facsimile of the Pommersfeld fragments is given in the Appendix to the second vol. A third independent source are two MSS. of the *Gromatici Scriptores* which contain the title *finium regundorum* (x. 1). They are of the ninth or tenth century, and shew that the compiler of these writings of the land-surveyors had a different text before him from that exhibited by the Florentine MS.

These three independent MS. sources have a special value besides their bearing on the particular correction of the parts of the Digest contained in them. They shew that the Florentine MS., good as it is, and carefully corrected as it has been, yet is not a perfectly faithful copy of the original. In the short title *finium regundorum* Mommsen counts five passages where the reading of the Florentine MS. requires correction, and seven others where it requires supplementing from the text given in the *Gromatici*. Similarly in 133 lines of Mommsen's edition, seven passages receive correction or supplement from the Naples palimpsest, and this number would probably be increased if the palimpsest were not mutilated or illegible in parts. Even the MSS. of the Code, which contain two of the prefatory constitutions of the Digest, do not agree entirely with the Florentine MS.

The other MSS. are all in small characters. One written in the ninth century contains the end of the Institutes and about half of the first book of the Digest. This fragment is one sheet, inserted in a MS. containing Julian's Epitome of the Novels, and now in the

public library at Berlin. It was either copied from a copy of the Florentine, or more probably from a ms. closely resembling the Florentine.

All the other known mss. come from the Bologna school of law, and are therefore called *Bononienses*. Very few contain the whole Digest; the great mass contain, more or less completely, one or other of the three volumes, into which the Digest was divided during the middle ages. These are (1) *Digestum uetus* which contained Books i.—xxiv. 3. 1 2 as far as the words *Ulpianus libro trigesimo*<sup>1</sup>; (2) the *Infortiatum* containing Books xxiv. 3. 1 1 to end of xxxviii.: but the latter part of this, beginning with the words *tres partes* in Book xxxv. 2. 1 82, is often spoken of as a separate portion, and called (from the initial words) *Tres Partes*; (3) *Digestum nouum*<sup>2</sup> containing Books xxxix.—L. (There is no trace of such a division in the Florentine ms.) There are at least 200 mss. of the *Digestum uetus*, and, if the three volumes be reckoned separately, probably 500 mss. of the Digest in all: the oldest of these being of the time of Irnerius the founder of the Bolognese school, who lived at the end of the eleventh and beginning of the twelfth century. Only the older and better of these mss. contain the inscriptions of the laws in full, and even these have not the Greek parts complete. Some mss. leave a blank, others insert a Latin version. The Bolognese mss. of the *Digestum uetus* are both older and better than those of the rest of the Digest.

<sup>1</sup> So Mommsen's oldest mss. Others stop at the end of xxiv. 2.

<sup>2</sup> The origin of this division and of the names is unknown. According to Odofredus (who died A.D. 1265) they are connected with the gradual way in which Justinian's works became known at Bologna. First the *Codex* i.—ix. and *Digestum uetus* and *nouum* and the Institutes: then the *Infortiatum* without the *Tres Partes*: then the Three Books (i.e. Cod. x.—xii.) and last the *Authenticum* (i.e. Latin version of the Novels). Savigny (*Gesch. des röm. Rechts* iii. p. 431 sq.) suggests that the *Dig. uetus* was first found, then the *Dig. nouum*; then the *Infortiatum* which was so called ("strengthened") when the *Tres Partes* was added to it, whether that was found subsequently, or, as Savigny thinks, previously placed at the head of the *Dig. nouum*. Mommsen assigns no weight to Odofred's account (*Pref.* p. lxxii.). Scheurl (*Z. R. G.* xii. p. 146. sqq.) points out that the course of study as settled by Justinian may have led to such a division of the Digest mss. as is found in the Bolognese copies. Books i.—xxxvi. were all that were intended for study. This coincides with the *Uetus* and *Infortiatum* (exclusive of the *Tres Partes*), if we suppose a few leaves lost at the end. Books i.—xxiii. were all to be lectured on; of the remaining books only xxvi. xxviii. and xxx. The *Uetus* omits only these last scattered books, and contains all the continuous portion, and only two titles more, these titles being closely connected with the preceding. Hence he thinks it may well be that the Bolognese found at first only a copy of the *Uetus*, and then of the *Infortiatum* less the *Tres Partes*, and, after obtaining the Florentine ms. or a copy of it, used the old mss. only to correct it. Hence it comes that there is in the Bolognese mss. no valuable correction of the Florentine text in the *Tres Partes* or *Nouum* (see below, p. cxxli).



Mommsen employed five MSS. of the *Dig. vetus* and rejected not a few others, all of the end of the eleventh or beginning of twelfth century. Of the *Infortiatum* he had only one, of the *Dig. novum* none, earlier than the thirteenth century.

The relation of these Bolognese MSS. to the Florentine is a matter of much difficulty. The distribution into three or four volumes, certain transpositions common to all the older of them, innumerable identical omissions, insertions, corruptions, shew that they are of common origin, variously corrected by conjecture or reference to a better MS. This common original, was it the Florentine or another? Mommsen holds it to have been not the Florentine itself, but one copied from it. Not the Florentine itself, because one notable transposition in Book xxiii. 3 does not accord with the pages of the Florentine MS., and the nature of the mistakes in the older MSS. points to a MS. written in a different character. But this original of the Bolognese MSS. must have been copied from the Florentine, because, amongst other reasons, (1) the Bolognese MSS. agree with the Florentine as against the Naples palimpsest and against the Gromatic MSS. of x. 1 (*Finium regundorum*); (2) they supply none of the larger gaps<sup>1</sup> in the Florentine and exhibit perpetually its errors; (3) they shew transpositions which are clearly explained by the Florentine MS. Of these, two are caused by an omission in the first writing of the Florentine, which was then supplied by the corrector in the margin, and the words thus added have been introduced, not into the right place, but into one in which a careless copyist from the Florentine would very naturally insert them. These are D. xxiii. 3. l 10. pr., shewn in facsimile appended to Mommsen's 2nd vol.; and xxxviii. 7. l 1 for which see Momms. *Pref.* p. lxxvii. A third transposition is in the last title of the fiftieth book. All known MSS. have this order of the extracts: l 117, then l 158.—l 199; l 118.—l 157; l 200. The Florentine MS. explains this precisely, a fact first noticed by Taurelli. Two leaves, viz. 463, 464 have been transposed by the binder and have thus led to the inversion<sup>2</sup>.

But this is not a complete account of the relation. For there are a fair number of passages in which these Bolognese MSS. give us

<sup>1</sup> These larger gaps are (a) a space of  $2\frac{1}{2}$  lines between § 1 and § 2 of D. xxxvi. 2. l 19; (b) a space of 17 lines and a single column at the end of XLVIII. 20; (c) a space of more than four columns at the end of XLVIII. 22. Some smaller gaps are filled by the corrector (Mommsen, p. lv.).

<sup>2</sup> Savigny (*Gesch.* iii. p. 461 sq.) adopts a suggestion that the inconvenience of a different order in one copy from another led to all MSS. being made to follow the Florentine order.

the true reading where the Florentine does not, and yet this true reading is such as cannot be reasonably attributed to conjecture. In particular there are a number of passages in which words evidently, or at any rate probably, genuine are supplied by the Bolognese mss. and are absent from the Florentine. Savigny gives a list of 26 such passages (*Gesch.* III., p. 455). Mommsen enumerates 30 (*Pref.* p. lxx.), but disallows some of Savigny's. The most probable explanation of the facts is therefore, according to Mommsen, that Irnerius, or some one yet older, noted on his copy, mediate or immediate, of the Florentine, some readings of another ms. different from the Florentine, and that this copy has been the parent of the Bolognese mss. (*Pref.* p. lxviii.). Whatever be the precise truth on this matter, it is clear on the one hand that the mass of variations from the Florentine readings are due to error or conjecture, and on the other that, being right in a few places, the Bolognese readings cannot be wholly neglected. Mommsen considers that there is no instance after the thirty-fourth book (and therefore no instance in the *Tres Partes* or in the *Digestum novum*) in which the Bolognese reading, even if right, can claim to be superior to a conjecture. Curiously enough in the seventeenth book where the ordinary corrector of the Florentine is wanting (viz. from tit. 1. 1 27 to tit. 2. 1 30 inclusive; see however Mommsen *Pref. ad ed. mai.* p. lxxxvii.) the Bolognese recension is of real value.

But there is another aid to ascertaining the real text of the Digest which is of greater value than the Bolognese mss., and that is the old Greek commentators. For they were not only commentators, but translators as well. It was all very well for Justinian to consolidate the law of Rome, but the language of half the empire and of the court was Greek, and the law had to speak the language of the judges, the practitioners and the suitors<sup>1</sup>. The chief law-schools were Constantinople and Berytus, both in Greek-speaking countries. Justinian's Constitutions issued subsequently to the re-

<sup>1</sup> As a specimen of the mode in which law Latin was turned into Greek compare the following extract from Stephanus' commentary with our 1 25. § 7. *ἐπειδὴ εἰρήκαμεν προσπορίζεσθαι τῷ οὐσουφρουκτουαρίῳ τὰ ἐξ ῥὲ αὐτοῦ βέλ ἐξ ὁπέρις, οὐσουφρουκτουάριον τίνα νοήσομεν, πότερον ἐν ᾧ κατὰ διαθήκην ἢ λεγάτον ὁ οὐσουφρουκτος συνέστη, ἢ καὶ τὸν κατὰ τὰ παλαιὰ ἢ ἐπερώτησιν ἢ κατὰ ἄλλον τρόπον τινὰ διὰ τῆς φαιμίλει νεγκισκούνδαε ἢ τοῦ κομμοῦνι διβιδούνδο οὐσουφρουκτον λαβόντα; φησὶ τοίνυν ὁ Πήγασος, ἀποδέχεται δὲ αὐτὸν Ιουλιανὸς, προσπορίζεσθαι ταῦτα τῷ ὁπωσδήποτε γενομένῳ οὐσουφρουκταρίῳ. The law is thus briefly given in the text of Bas. Παντὶ τῷ τὴν χρῆσιν ἔχοντι τὰ ἐκ πράγματος αὐτοῦ ἢ ἐξ ὑπηρεσίας τοῦ δούλου προσπορίζεται.*

vised Code were almost all in Greek, though some few of them were published in Latin also. Hence Justinian's Latin law books required interpretation into Greek. An early paraphrase of the Institutes still exists under the name of Theophilus. For the Code the most celebrated interpreter was Thalelaeus, and his version it is which was chiefly adopted in those passages of the Code which were taken into the Basilica. For the Digest we have substantial remains of four interpreters, Dorotheus<sup>1</sup>, Stephanus, Cyrillus and one generally called Anonymus. Theophilus, a professor at Constantinople, and Dorotheus, a professor at Berytus, assisted Tribonian in compiling the Institutes, and were on the Commission for compiling the Digest. Theophilus was also on the Commission for preparing the first Code, and Dorotheus was on that for revising it. Both along with Thalelaeus are named among those to whom Justinian addressed his Constitution (*Omnem*) for reforming the course of legal education. Stephanus was a professor of law, according to Heimbach not the same as, but junior to, Stephanus the advocate, who was one of the compilers of the Digest. He appears to have lived and lectured about the middle of the sixth century. Cyrillus appears to have lived about the end of that century, but little is known of him. The nameless interpreter is in all probability identical with one called Enantiophanes, as the author of a book on the contradictory passages in the Digest (*περὶ ἐναντιοφανεῶν*). His real name was, according to modern scholars, Julian. Julian was author of a Latin Epitome of Justinian's Novels, and lived probably in the middle of the sixth century. Looking to the internal evidence and to the prohibition by Justinian (see above, p. xxv), we may conclude that the comments are reports of lectures: the versions may have been issued by the writers themselves.

Our knowledge of these versions and commentaries is chiefly due to the *Basilica* ('Imperials'). Basil (*Βασίλειος*) the Macedonian, emperor from A.D. 867 to 886, directed the consolidation of the Justinian law books into a single code of 40 (or 60) books, entitled *Ἀνακάθαρσις τῶν παλαιῶν νόμων*, 'Reformation of the old laws'. Whether this was completed or published is uncertain. He published a short institutional treatise called *ὁ πρόχειρος νόμος*, 'Handy Law', which was re-edited in 885 under the name *ἐπαναγωγή* ('New

<sup>1</sup> Zachariä dates Dorotheus' version 'after 542': that of Stephanus 'towards the end of Justinian's reign', those of Cyril and Anonymus 'in the reign of Justin' (565—578); the work of Enantiophanes 'in the reign of Heraclius' (610—641). See his *Gesch. des gr. röm. Rechts*, ed. 2. 1879, p. 5 sqq.



Edition') τοῦ νόμου. His son, Leo the Philosopher, either completed or revised and published, between 886 and 892 (Heimbach in *Z. R. G.* VIII. p. 417), the code in 60 books which was commonly called τὰ βασιλικά (from βασιλεύς, not from the emperor Βασίλειος). No one MS. has preserved to us the whole of this, but various MSS. have preserved parts, so that we have more than two-thirds of the whole, viz. Books I.—XVIII. (the last three, however, being mutilated), XX.—XXX. (the last being mutilated), XXXVIII.—XLII., XLV.—LII., and LX. Book XIX. has been partly restored from other works. The *Basilica* consist of large selections from the Digest, Code and Novels, arranged in this order under titles following in general the order of the Code, the matter, however, of Books VIII., IX., XI., XXXIX. 1—3, XLIII. and XLVII. of the Digest being put mainly in the last three books of the *Basilica*. In a few titles some passages from Theophilus' paraphrase of the Institutes occur. They usually are placed first.

About the middle of the tenth century a number of *scholia* or notes were added to the *Basilica*, and are found in the MSS. These contain many extracts from the *indices* ('short expositions') of the old commentators on Justinian's works, and also a number of more recent notes. The extracts from the old Greek commentators are of great value, both for the text of the Digest itself and for its explanation.

In those passages of the *Basilica* which were taken from the Digest, the Greek text is usually the version made by the anonymous commentator (Julian?), but Greek translations have been made of the Latin technical expressions which Anonymus and the others generally preserved<sup>1</sup>. Sometimes other versions, chiefly Cyril's, have supplied the text of the *Basilica*. The compiler appears to have had before him the works of Stephanus and Dorotheus. Stephanus is largely represented in the *Scholia*, but his version is mixed with his commentary. It is no doubt a report of his lectures, and it is in accordance with this that notes of his are found only on Dig. I.—XXIII., XXVI. and probably XXX. These, with the addition of Book XXVIII., are exactly the books on which, by Justinian's directions, lectures were to be given. Dorotheus' index has been used for the other books. Cyril's version and notes are also partially in the *Scholia*. All the older *Scholia* are adapted to Justinian's text, and the references are made to that. The versions differ from one another

<sup>1</sup> See, for instance, the passage quoted in the note on p. ccxli.

in point of fulness. Thalelaeus' version of the Code was literal (κατὰ πόδα). Dorotheus' version of the Digest approaches the same character, and is therefore the most useful for correcting the Latin text. Stephanus' version is a paraphrase, and hence obtained the name of τὸ πλάτος, 'breadth'.<sup>1</sup> The versions of Anonymus and Cyrillus, the latter especially, were concise (κατ' ἐπιτομὴν), and for the text of the Digest are of use chiefly when neither of the fuller versions is preserved. Mommsen has carefully used these sources for correcting the text of the Digest, and has made some useful remarks (*Pref.* p. lxxiv. sqq.) as to the caution necessary in using, for the ascertainment of the Latin text, Greek versions, and especially Greek versions mixed with comments, and in comparing the evidence of this inferential text with that of the Florentine MS.

The above account of the Greek writers rests on Heimbach's elaborate *Prolegomena* published in Vol. vi., a supplementary volume, of his edition of the *Basilica*. (See also an account in German by the same writer in *Z. R. G.* II. 318 sqq.) Appended to this is a *Manuale* in which he assigns, partly by internal evidence, an author to each of the older Scholia which are preserved, and refers them to the appropriate passage of the Institutes, Digest, Code and Novels. Four of the books of the *Basilica* (xv.—xviii.) had previously been reedited from fresh ms. sources by Zachariä von Lingenthal, and these contain the Scholia conveniently arranged and named. (It is published as a kind of appendix to Heimbach.) Our present title, *de usufructu*, is contained in this, and forms by itself the whole of tit. 1 of the xvth Book of the *Basilica*.

<sup>1</sup> Cf. D. XLVI. 3. 1 13 *Sed hoc ἐν πλάτει et cum quodam spatio temporis accipi debet*, i.e. 'must be taken broadly'.

## CHAPTER XVIII.

## OF THE MODE OF CITING THE DIGEST.

THE Byzantine commentators cited a passage by the number of the book, title and extract, prefixing β. for βιβλίον, τ. for title and δ.γ. (i.e. digest) for the extract. The Glossators, finding either no numbers or varying numbers in their MSS., cited by the rubric (abridged) of the title and the first words of the extract and of the paragraph. In the 16th century the numbers of the extract and of the paragraph were added, and, later on, the initial words were omitted. Until quite recently the practice continued of denoting the title by the rubric simply, but now the number of the book and title are usually given, and have sometimes superseded the rubric altogether. In Germany the rubric is usually given, except in books intended not so much for jurists as for philologers generally.

Editions of the Digest have an index of the rubrics, by which the book and title can readily be found. The older editions, e.g. Godefroi's, have an index of all the extracts by their initial words.

The order of arranging the parts of a reference also varies. The Byzantines generally put them in the order—book, title, extract. The Glossators did the like: rubric, extract, paragraph. But after them arose the practice of putting first the extract and paragraph and then the rubric. This is still the most usual way in Germany, though some have returned to what seems the more natural order.

The Digest is denoted by *Dig.* or *D*; Π or π (for *Pandectae*): or in older books very often by *ff*, which has arisen by calligraphic development from a *d* with a line through it. (Transitional forms may be seen in *Z.R.G.* XII. 300: see also XIII. 399.)

An extract in the Digest is usually denoted by *lex* or *L* or *l*: sometimes by *fr.* (for *fragmentum*). Sometimes *cap.* or *c.* for *caput* has been used. The paragraphs are usually denoted by §.

I have adopted the plan of denoting the book by roman numerals, the title by arabic numerals, and always prefixing *l* to the number of the law or extract, and § to that of the paragraph. I have omitted the rubric, as probably not of much service to English readers, and as adding much to the length of the reference.



It is not uncommon in modern jurists to prefix or affix the name of the author of the extract, e.g. *Ulp.* or *Gai.* Some even add the work and book of the author. There are occasions when such an addition is useful, but as a rule it complicates the reference greatly.

The following examples will show the principal modes. Further varieties are created by roman or arabic numerals, by addition or omission of brackets, and by different abridgements of the rubrics.

βι. σ'. τί α. δγ. κγ'. So Byzantine Commentators.

*D* (or *ff*) *de rei vind. l in rem. § tignum.* So the Glossators.

*l in rem § tignum ff rei vind.* (*D* or *ff* is often omitted, e.g. by Cujas.)

*l in rem 23 § tignum 6 D de rei vind.*

*L 23. § 6. D. de rei vind.* So Glück.

*L 23 § 6 de rei vind. (6. 1).* So Savigny and Thibaut.

*fr. 23 § 6 de R. V. 6, 1 (Ulp.).* So Bekker.

*D. de rei vind. vi. 1, 1 23 § 6.* So Schrader.

*Paul. 21 ad Ed. (D. vi. 1, 23 § 6).* So Voigt.

*Paulus Dig. 6, 1, 23, 6.* So Mommsen in *Staatsrecht.*

*D. vi. 1. 1 23. § 6.*

The three books on Legacies (xxx, xxxi, xxxii) are often quoted as *D. de legat. i.*, *D. de legat. ii.*, *D. de legat. iii.*

The rubrics are abridged, e.g. xxii. 1. is quoted as *de usuris* instead of *de usuris et fructibus et causis et omnibus accessionibus et mora*; xxiv. 3. as *sol. matr.* instead of *solutio matrimonio dos quemadmodum petatur*; vii. 1. as *de usufr.*, &c. Many are frequently quoted by initials, e.g.

*de I. et I.* (for i. 1 *de iustitia et iure*);

*de O.I.* (for i. 2 *de origine iuris*, &c.);

*de D.R.* or *de R.D.* (for i. 8 *de divisione rerum et qualitate*);

*de N.G.* (for iii. 5 *de negotiis gestis*);

*de H.P.* (for v. 3 *de hereditatis petitione*);

*de R.V.* (for vi. 1 *de rei vindicatione*);

*de S.P.U.* (for viii. 2 *de servitutibus praediorum urbanorum*);

*de S.P.R.* (for viii. 3 *de servitutibus praediorum rusticorum*);

*de R. C.* (for xii. 1 *de rebus creditis*, &c.);

*de C.E.* (for xviii. 1 *de contrahenda emtione*);

*de A.E.V.* (for xix. 1 *de actionibus emti uenditi*);

*de R.N.* (for xxiii. 2 *de ritu nuptiarum*);

*de* I.D. (for XXIII. 3 *de iure dotium*);

*de* H.I. (for XXVIII. 5 *de hereditatibus instituendis*);

*de* A.v.O.H. (for XXIX. 2 *de acquirenda uel omittenda hereditate*);

*de* B.P. (for XXXVII. 1 *de bonorum possessionibus*);

*de* A.R.D. (for XLI. 1 *de acquirendo rerum dominio*);

*de* A.v.A.P. or *de* A.P. (for XLI. 2 *de acquirenda uel amittenda possessione*);

*de* O. et A. (for XLVI. 7 *de obligationibus et actionibus*);

*de* V.O. (for XLV. 1 *de uerborum obligationibus*);

*de* I.F. (for XLIX. 14 *de iure fisci*);

*de* V.S. (for L. 16 *de uerborum significatione*);

*de* R.I. (for L. 17 *de diuersis regulis iuris antiqui*).

The *de* is sometimes omitted.

In the older books, e.g. Godefroi's notes to Digest, earlier laws or titles are referred to with  $\bar{s}$  prefixed (for *supra*); later laws or titles with  $\bar{i}$  or  $\bar{j}$  (for *infra*). Thus (in a note on the earlier part) 1 6  $\bar{J}$  *de iure dotium* refers to D. XXIII. 3. 1 6.

*h. t.* (*hoc titulo* or *huius tituli*) for the title on the subject on which one is writing. *Eod.* for *eodem titulo*, for the last title referred to. *Rubr.* where the rubric itself is the subject of the reference; *t. t.* (*toto titulo*) when the whole title is referred to. *Arg.* is added to a reference when the passage cited does not directly, but only by inference (*argumento*), support the proposition. *Uerbis* or *in uerbis*, (in the Glossators *uersi.* for *uersiculo*) is prefixed to any special words on which stress is laid.

When only one extract forms a whole title (e.g. XLIII. 15) *l. un.* or the like (for *lex unica*) is given in place of the number of the extract. The last extract or paragraph is often denoted by *l. ult.* or *fi.* (*finalis*) or § *ult.*; the last but one by § *penult.*; &c.

When there is more than one paragraph in an extract the first paragraph is quoted as *pr.*, i.e. *in principio*; and number 1 denotes the first-numbered, but really the second, paragraph. This probably arose from the notion, that it was unnecessary to begin numbering the parts of a law or extract, till you came to a new point or subject.

In the old times when they quoted by initial words, if it happened that several laws began with the same word, they were quoted thus, e.g. 1 5 of D. IV. 2 was distinguished as *l metum* I, 1 6 as *l metum* II, &c.

The Constitutions printed at the commencement of the Digest directing its composition, &c. are still usually quoted by the final

words, viz. Const. *Deo auctore*, Const. *Omnem*, Const. *Tanta* or *Δέδωκεν* (see above, p. xxiv). Similarly the constitutions prefixed to the code viz. *Haec quae necessario*, *Summa reipublicae*, and *Cordi*.

The other parts of the *Corpus Iuris* were quoted in analogous ways. The Codex was denoted by *cod.* or *c.* and the several constitutions either by *cap.* or more usually *l.* or *c.* or *const.* or *cost.* The Greeks have *διατ.* for *διάταξις*. The Institutes were denoted by *ist.* or *inst.* or *I.*, e.g.,

C. de pactis l. si pascenda	Inst. de rer. diu. § illud quaesitum.
1. si pascenda C. de pactis	§ illud quaesitum, Inst. de rer. diu.
1 8. C. de pactis	§ 13 I. de rer. diu.
1 8. C. de pactis (2. 3) or (II. 3)	§ 13 I. de rer. diu. (2. 1) or (II. 1).
1 8 de pactis 2, 3.	
C. de pactis 2. 3. cst. 8	I. de rer. diu. 2. 1. § 13.
Cod. II. 3. 1 8	Inst. (or Iust.) II. 1. § 13.

The Novels (or rather the Latin translation of them) are called in the older books *Authenticæ*, and so referred to as *Auth.*; now as *Nov.* and the sections as *c.* 2, &c. (for *caput*) sometimes with subordinate paragraphs (§ 1, &c.).

For fuller accounts see Thibaut, *Civil. Abhandl.* p. 205; Schilling, *Inst.* I. §§ 39—42; Wächter, *Pand.* I. pp. 46—51.

## CHAPTER XIX.

### BOOKS RECOMMENDED.

IN conclusion it may be convenient if I name out of the large number of books on Roman Law some which seem to me especially useful to students of the Digest. Most, however, are in German.

1. For the text, Mommsen's critical edition in 2 vols. 4to is far the best: and, in a matter of text, everything depends on methodical examination and sifting of the authorities, followed by wise rejection of the bad and use of the good only. The stereotype edition in one



volume, including also Krüger's revision of the Institutes, is quite sufficient for most purposes, and is that which all students should have. It contains all the various readings which they need to care about; references to or citations of all passages extant from ante-Justinian jurists which have been incorporated in the Digest; references to the parallel parts of the Code and Basilica; and a brief statement, at the commencement of each title, of the distribution of the several extracts among the groups of works as ascertained by Bluhme.

2. Next to the text of the Digest in importance come the remains of the ante-Justinian lawyers and of laws and legal documents. The former are conveniently collected by Huschke (4th ed. 1879), whose abundant learning and ingenuity are shewn in the notes and conjectural restorations of the text. But another edition, less full and as yet incomplete, by Krüger, Studemund and Mommsen is more trustworthy, because the text is less conjectural. The Vatican Fragments have been twice edited by Mommsen, viz. an apograph and text with supplements (1860) and also a critical text in smaller form (1861). A third edition is to appear in the 3rd vol. of the last-named work. Gneist's *Syntagma* (i.e. parallel texts of Gaius and Justinian's Institutes) contains in the appendices and notes pertinent selections from Ulpian and Paul, and from other ante-Justinian sources. Of some other editions of Gaius I have spoken above, p. clxxx.

Bruns' *Fontes iuris Romani* (4th ed. 1879) contains all the extant laws outside of the Codes and Novels, specimens of conveyances, agreements, receipts, &c., some other inscriptions which have a legal bearing, and legal extracts from Festus, Varro and others. Since Bruns' death (1880), Mommsen has undertaken the charge of the book and has published a small supplement.

Hänel's *Corpus Legum* (1857) contains all the information we have respecting the imperial legislation not contained in the Codes (Theodosian, Justinian, &c.) or in the Novels. This information consists of extracts, from the Digest and historians and others, relating to the laws, digested in the chronological order of the Constitutions, with copious indices. Hänel has also edited critically the Theodosian code and the remains of the Gregorian and Hermogenian codes (1837) as well as the *lex Romana Visigothorum* (see p. clxxiv).

Justinian's Code has been edited critically by P. Krüger (2 vols. 4to.). The stereotype edition, uniform with Mommsen's Digest, is

convenient and sufficient for students. (A corresponding edition of the Novels by R. Schöll is only in part published.)

3. As to notes or commentary on the Digest I can refer to none except Godefroi's at the foot of his editions. I have sometimes found it useful in giving a reference to some other pertinent passage. Glück's *Ausführliche Erläuterung der Pandekten* (56 vols.) is not a commentary on the Digest, but a series of treatises on the subject-matter of the different titles of the Digest. On those particular passages which it happens to discuss the information is very good for the time, but the volume containing *De usufructu* is dated 1808. Some of the volumes recently published, e.g. Arndts on *Legacies* (1868—1878 unfinished), Leist on *Bonorum Possessio* (1870—1879), are valuable monographs, with close reference to the original authorities.

The Byzantine Commentators, published in Heimbach's *Basilica* and Zachariä's Supplement (see above, p. ccxlv) are sometimes of real assistance for the interpretation, as well as for the text, of the Digest.

4. There are three lexicons to the *Corpus Iuris*, all of which are excellent. Brisson's is the oldest, and as edited posthumously by Heineck (fol. 1743) is a very useful work. It contains references to other writers besides the Jurists. I regret that for some time I went without it under the false belief that it was superseded by the two others.

Dirksen's (4to. 1837) is more modern, and has some special features. It contains examples of expressions synonymous, and opposed to, the word in question. But it does not extend beyond the lawyers.

Heumann's is the most modern (6th ed. 1884, 8vo.), has the explanations in German, is well done and is a handy volume. But it is even more exclusive than Dirksen's, having comparatively few references outside the *Corpus Iuris*, and the passages are not quoted so fully as in the other two.

5. Of Histories and Institutional treatises there is none quite satisfactory. Zimmer's *Geschichte* (1826) is full, and good as far as it goes, but it is incomplete. It contains the external history and also the history of the law of persons and of the law of procedure. Schilling's *Institutionen und Geschichte* (1834—1846), also unfinished, in

some degree supplements Zimmern, as it deals with the Law of Things and of Obligations. Rudorff's is more modern (1857), and has a great deal of matter compressed into a small space, but is not free from rash conjectures, which are not sufficiently distinguished from what rests on fair evidence. It contains the external history and procedure, the latter very fully but concisely treated.

Puchta's *Cursus* is a very able book, but the history of obligations, family law, and inheritance is published only from a brief lecture ms., his early death (1846) having prevented the completion of the work as intended. It has been frequently edited by Rudorff with additional notes, and lately (in 2 vols. 1881) by P. Krüger.

Walter's *Geschichte* (2 vols. 3rd ed. 1860, 61) is the work of an accomplished scholar, learned both in Roman, Ecclesiastical and German Law. It is complete and clear, with some peculiar views, but for the general reader is more suitable than any of the above. The author is however dead, and a good deal has been done by the publication of inscriptions, the verification of texts, and the discussions of lawyers and scholars since this work was last edited.

The most recent work of this kind is Kuntze's *Cursus* and *Excursus* (2nd ed. 1879, 1880). The 1st vol. (*Cursus*) is especially noticeable for containing among other matters a system of Roman private law at the time of the Classical Jurists. The *Excursus* is a collection of long notes on special points. Both volumes are full of the results of the most recent inquiries. There is a great deal of useful information and suggestion, but it is accompanied by a romanticism which largely obscures and perhaps sometimes distorts the ascertainable facts.

Danz's *Lehrbuch der Gesch. d. röm. Rechts* (1871) is very convenient for its analyses of various views on many controverted points (e.g. *iusiurandum*, *res Mancipi*, *nexum*, *litterarum obligatio*, &c.).

Keller's *Institutionen* (1861) are admirable on the matters of which they treat. The book is in fact a series of *excursus*.

A good book, intended as a handbook for lectures, is Salkowski's *Institutionen und Geschichte* (3rd ed. 1880). It contains a continuous summary of the divisions and doctrines of Roman Law with a large number of illustrative passages selected from the original sources. Neither the history of the doctrines nor procedure is omitted. A convenient general book for those who have no other is Vering's *Geschichte und Pandekten* (4th ed. 1875) which also gives a brief account of German feudal law.



6. The passages in the Digest bearing on any particular subject or point are often scattered in different, and sometimes in not very obvious, titles. Hence a dogmatic treatise with ample references is necessary. Of such there is in Germany no lack. Monographs are too numerous to mention. Savigny is always admirable for learning and thought, and incomparable for grace of exposition. Puchta's (edited by Schirmer, 1877), Böcking's (1853—55, unfinished), Keller's (posthumous, 1866), Arndts', Windscheid's, Vangerow's and Wächter's *Pandekten* are all excellent. The last two can be specially recommended both for matter and style. Vangerow's is not a continuous exposition, but a series of critical and analytical discussions of controverted questions of Roman law, very carefully and clearly written. Nothing however has been done to it since Vangerow died in 1870. Wächter's *Pandekten* (based to some extent on Arndts) is not so well known, because it was only published in 1880, after its celebrated author's death. But it is clear and masterly. Arndts died in 1878, but his work has been reedited since. Windscheid is happily still alive. Both his and Arndts' works are in current use and high esteem. Other works might easily be named; but all of them deal with the law as now received in Germany, and not, except occasionally, with the special exegesis of the Digest, and thus (e.g.) matters relating to slaves receive but slight attention. An able and elaborate book in French by Maynz in 3 vols. called *Cours de Droit Romain* (4th ed. 1876) may be especially recommended to those who do not read German.

7. The application of the Digest &c. to modern life is illustrated by a collection of cases from German law-courts, edited by Girtanner (4th ed. by Langenbeck, 1869), and adapted to Puchta's *Pandekten*. The decisions are not given, but a *Pandekten-praktikum* by Pagenstecher (1860) furnishes a guide to the solution.

My references will, I think, be intelligible to those who wish to refer to the books. But it is well to mention that *Z.G.R.* means the *Zeitschrift für geschichtliche Rechtswissenschaft*, edited by Savigny and others (15 vols. 1815—1850): and *Z.R.G.* the *Zeitschrift für Rechtsgeschichte* by Rudorff and others (13 vols. 1861—1878). The avowed successor of this is *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte* by Bruns, Pernice and others (1880, and still continued). I have quoted this usually as *Z.R.G.* with continuous numbers (Vol. i. being *Z.R.G.* xiv. &c.). I regret not to have had access to some other German periodicals.

## APPENDIX A.

### DIVISION AND ORDER OF MATTERS IN THE DIGEST.

(See Chap. III.)

#### INTRODUCTORY.

Book I. 1—4. Introductory and general.

#### I. JURISDICTION, PARTIES TO SUITS AND BARS TO SUITS.

- Book I. 5—7. Subjects of rights: freedom; fatherly power; adoption.
8. Objects of rights: things corporeal and incorporeal; individual, whole; sacred, profane.
- 9—22. Powers and duties of high state officers.
- II. 1—11. Jurisdiction. Securing appearance of parties.
12. Days for trial: holidays: postponements.
13. Production of documents (*de edendo*).
14. Bargains not to sue, and bargains generally (*de pactis*).
15. Compromises (*de transactionibus*).
- III. 1, 2. Qualification to conduct suits. Infamy.
- 3, 4. Authorised representation (*de procuratoribus*, &c.).
5. Unauthorised representation (*de negotiis gestis*).
6. Malicious suits (*de calumniis*).
- IV. 1—7. Annulment of suits; Intimidation, fraud, minority, *cap. dem.* &c.
8. Arbitration.
9. Action against ship-captains and inn-keepers.
- V. 1. Place of trial.

#### II. SUBJECT-MATTER OF SUITS.

##### A. Suits by owners.

Book V. 2—6. Suits for an *universitas*; viz. for an inheritance.

VI. 1—3. Suits for individual things, viz. suits *in rem* by owners and *quasi*-owners.

- Book VII. 1—9. Personal servitudes.  
 VIII. 1—6. Real servitudes.  
 IX. 1—4. Damage by fault and negligence (*Lex Aquilia*).  
 X. 1. Ascertainment of property (*Finium regundorum*).  
 2, 3. Partition of property (*Famil. ercisc. and Com. diu.*).  
 4. Production of disputed property (*ad exhibendum*).  
 XI. (Supplementary.)  
 1. Interrogatories.  
 2. Consolidation of suits.  
 3, 4. Spoiling or concealing slaves.  
 5. Dice playing.  
 6. Fraudulent surveyors.  
 7, 8. Tombs; funeral expenses: rights of burial.

**B. Suits on contracts. (Commercial dealings.)**

- Book XII. 1. Money lent (*mutuum*).  
 2, 3. Oaths.  
 4—7. Money unduly paid.  
 XIII. 1—5. Other suits for recovery *in genere*.  
 6. Recovery of loan *in specie* (*commodatum*).  
 7. Recovery of thing pledged (*act. pignoratitia*).  
 XIV. XV. Suits against principals on agents' contracts.  
 XIV. 1. Shipmaster's contracts (*act. exercitoria*).  
 2. Particular average (*Lex Rhodia*).  
 3. Shopkeeper's contracts (*act. institoria*).  
 4. }  
 XV. 1—4. } Children's and slaves' contracts.  
 XVI. 1. Guaranties by women (*S. Uelleianum*).  
 2. Set-off (*de compensationibus*).  
 3. Deposit.  
 XVII. 1. Unpaid agency (*mandati*).  
 2. Partnership (*pro socio*).  
 XVIII. 1—7. }  
 XIX. 1. } Purchase and sale.  
 2—5. Hire, exchange, and the like.  
 XX. 1—6. Pledge. Rights of pledgees.  
 XXI. 1—3. Rescission of purchase, and eviction.  
 XXII. (Supplementary.)  
 1. Interest; mesne profits: delay.  
 2. Loans on bottomry.  
 3—5. Presumptions, documentary and personal evidence.  
 6. Ignorance of law and of fact.



## C. Suits arising from family relations.

## a. HUSBAND AND WIFE.

- Book XXIII. 1. Betrothal.  
                   2. Marriage: who may intermarry.  
                   3—5. Dowry.  
 XXIV. 1. Gifts between husband and wife.  
           2. Divorce.  
           3. }  
 XXV. 1, 2. } Claims on dissolution of marriage.  
           3—6. Rights of unborn children, and claims for alim-  
                   ment.  
           7. Concubines.

## b. GUARDIAN AND WARD.

- Book XXVI. 1—6. Appointment of guardians.  
                   7—9. Guardians' management and responsibility.  
                   10. Removal of guardians.  
 XXVII. 1. Excuse from appointment.  
           2. Maintenance and education of ward.  
           3—6. Suits for and against real and assumed  
                   guardians.  
           7, 8. Suits against guardians' sureties and local  
                   magistrates.  
           9. Prohibition of sale of ward's land.  
           10. Appointment of *curator* to lunatics, &c.

## D. Succession to deceased pater(mater)familias.

## a. SUCCESSION BY WILL: TESTATOR, HEIR, LEGATEE.

- Book XXVIII. 1—7. Wills: power and duties of testator.  
                   8. Time to heir to deliberate.  
 XXIX. 1. Soldiers' wills.  
           2. Acceptance by heir named.  
           3. Opening of will.  
           4. Will protected against heir's disregard.  
           5. Punishment of testator's murderer to  
                   precede opening of will (*de Sc. Sila-*  
                   *niano*).  
           6. Interference with testator.  
           7. Codicils.  
 XXX. }  
 XXXI. } Legacies in general.  
 XXXII. }

Book XXXIII.	1—10.	} Special Legacies.	
XXXIV.	1—3.		
	4.		Ademption and transference of legacies.
	5.		Matters of doubtful interpretation.
	6—9.	Invalid legacies.	
XXXV.	1.	Conditional legacies.	
	2, 3.	Heir's right to a fourth ( <i>Lex Falcidia</i> ).	
XXXVI.	1.	Universal legacy ( <i>Sc. Trebellianum</i> ).	
	2.	Vesting of legacies.	
	3—5.	Legatees' right to security.	

## b. SUCCESSION IN SPITE OF AND BESIDE WILL.

Book XXXVII.	1—10.	Succession of relatives in spite of the will ( <i>Bonorum possessio contra tabulas</i> ).
	11.	Praetorian succession in accordance with will ( <i>Bon. poss. secundum tabulas</i> ).
	12.	Succession to emancipated child.
	13.	Wills of sailors and others like soldiers.
	14.	} Patrons' right to services and to suc- cession to property of freedmen.
XXXVIII.	1—5.	

## c. INTESTATE SUCCESSION.

Book XXXVIII.	6—15.	Succession by praetor's grant ( <i>Bon. poss. ab intestato</i> ).
	16.	Succession by statute ( <i>de suis et legitimis heredibus</i> ).
	17.	Succession of mothers and children ( <i>Sc. Tertullianum et Orfitianum</i> ).

## E. Suits between neighbours, and some other matters.

Book XXXIX.	1—3.	Suits between neighbours ( <i>Op. nov. runt.; damn. inf.; aq. plu. arc.</i> ).
	4.	Suits against taxfarmers.
	5, 6.	Gifts <i>inter vivos</i> and <i>mortis causa</i> .

## F. Claims to freedom arising from manumission or otherwise.

Book xl.	1—6.	Manumission in various modes.
	7.	Slaves manumitted on condition ( <i>de statu liberis</i> ).
	8.	Freedom without manumission.
	9.	Ineffectual manumissions.
	10, 11.	Grants to freedmen of freeborn privileges.
	12—16.	Assertions of freedom.

G. **Acquisition, especially by possession.**

- |           |       |  |
|-----------|-------|--|
| Book XLI. | 1.    | Acquisition of ownership.                                |
|           | 2.    | Acquisition and loss of possession.                      |
|           | 3—10. | Acquisition by possession ( <i>de usucapione</i> , &c.). |

III. **JUDGMENT AND EXECUTION.**

- |            |      |  |
|------------|------|--|
| Book XLII. | 1.   | Judgment.  |
|            | 2.   | Confession.                                      |
|            | 3.   | Voluntary liquidation ( <i>cessio bonorum</i> ). |
|            | 4—8. | Execution: Possession by creditors: bankruptcy.  |

IV. **INJUNCTIONS, SPECIAL PLEAS, BONDS AND SURETIES.**

- |             |        |  |
|-------------|--------|--|
| Book XLIII. | 1.     | Injunctions in general ( <i>interdicta</i> ).  |
|             | 2—5.   | Injunctions in connexion with inheritances.  |
|             | 6—15.  | Injunctions in protection of public rights.  |
|             | 16—28. | Injunctions in protection of private rights.   |
|             | 29—30. | Injunctions for production of freemen or children.   |
|             | 31—33. | Injunctions on behalf of moveables, lodgers' goods and pledges.  |
| XLIV.       | 1.     | Pleas in general.  |
|             | 2—6.   | Special pleas, viz. matter decided, length of time, fraud, intimidation, oath, unfair conditions on liberty, &c. |
|             | 7.     | Obligations and actions in general (introductory to stipulations).   |
| XLV.        | 1—3.   | Stipulations.  |
| XLVI.       | 1.     | Sureties.  |
|             | 2.     | Novation.  |
|             | 3—4.   | Release of stipulations.   |
|             | 5—8.   | Bonds required by praetor ( <i>de stipulationibus praetoriis</i> ).  |

V. **PUNISHMENT OF WRONGS.**

- |             |        |                            |
|-------------|--------|----------------------------|
| Book XLVII. | 1.     | Private wrongs in general. |
|             | 2—9.   | Theft and robbery.         |
|             | 10.    | Insult.                    |
|             | 11—21. | Extraordinary offences.    |
|             | 22.    | Clubs.                     |
|             | 23.    | Popular suits.             |



- |              |        |  |
|--------------|--------|--|
| Book XLVIII. | 1.     | Crimes.  |
|              | 2, 3.  | Indictments and imprisonment of accused.                                 |
|              | 4—15.  | Treason, adultery, violence, murder, forgery, extortion, kidnapping, &c. |
|              | 16.    | False accusations.   |
|              | 17—18. | Criminal procedure.  |
|              | 19—24. | Punishments.   |
| XLIX.        | 1—13.  | Appeals.   |

VI. SPECIAL AND PUBLIC LAW AND INTERPRETATION.

- |            |       |  |
|------------|-------|--|
| Book XLIX. | 14.   | Crown suits ( <i>de iure fisci</i> ).                                |
|            | 15.   | Effect of capture by enemy and of release ( <i>de postliminio</i> ). |
|            | 16.   | Military law.  |
|            | 17.   | Privileges of soldiers and veterans.                                 |
| I.         | 1—12. | Municipal government and duties.                                     |
|            | 13.   | Claims of professional persons: suits against judges.                |
|            | 14.   | Brokerage ( <i>de proxenetis</i> ).                                  |
|            | 15.   | Census of property.  |
|            | 16.   | Interpretation of special words and expressions.                     |
|            | 17.   | Maxims.  |

## APPENDIX B.

### DIVISION AND ORDER OF WORKS FROM WHICH EXTRACTS WERE TAKEN FOR THE DIGEST.

The following is a list of the works from which extracts were taken for the Digest, arranged in the order in which the several Committees dealt with them. A bracket denotes the simultaneous handling of the works or parts of works there named. The list is compounded of the tables framed by Bluhme, pp. 266 and 445, and is given here as slightly emended by Krüger, whose list forms the 5th Appendix to Vol. II. of Mommsen's larger edition of the Digest, and is also in the later issues of the stereotype edition. (I have however written *Gai, Pomponi*<sup>1</sup>, &c., not (as Krüger does) *Gaii, Pomponii*, &c.) In the case of works, from which only one or very few extracts occur, the evidence on which the place in the list is assigned is necessarily very slight.

The works are numbered consecutively on their first appearance in the list. Those printed in italics are not named, at least separately, in the Florentine Index.

#### PARS SABINIANA.

				libb.
1	{	ULPIANI ad Sabinum	. . . .	I—XIV.
2	{	POMPONI	„ . . . .	I—IV.
3	{	PAULI	„ . . . .	I, II.
	{	ULPIANI	„ . . . .	XV—XXV.
	{	POMPONI	„ . . . .	V—VII.
	{	PAULI	„ . . . .	III, IV.
	{	ULPIANI	„ . . . .	XXVI—XXIX.
	{	POMPONI	„ . . . .	VIII—XI.
	{	PAULI	„ . . . .	V.
	{	ULPIANI	„ . . . .	XXX.
	{	POMPONI	„ . . . .	XII, XIII.
	{	PAULI	„ . . . .	VI.

<sup>1</sup> If any justification is needed for my writing this form of the genitive, I would refer to the numerous *Privilegia Veteranorum* in *Corp. I. Lat.* III. p. 843 sqq. They were written in Rome from the time of Claudius to Diocletian, and the reading is certain. They are thus among the best evidences of orthography. They invariably give the genitive in *i*, not in *ii* (Mommsen *ib.* p. 918).

				libb.
	{	ULPIANI ad Sabinum	. . . .	XXXI—XL init.
	{	POMPONI       "	. . . .	XIV—XVII.
	{	PAULI         "	. . . .	VII, VIII.
	{	ULPIANI       "	. . . .	XL fin.—XLIII.
	{	POMPONI       "	. . . .	XVIII—XXII.
	{	PAULI         "	. . . .	IX, X.
	{	ULPIANI       "	. . . .	XLIV—L.
	{	POMPONI       "	. . . .	XXIII—XXVII.
	{	PAULI         "	. . . .	XI, XII.
	{	ULPIANI       "	. . . .	LI.
	{	POMPONI       "	. . . .	XXIX.
	{	PAULI         "	. . . .	XIII.
	{	POMPONI       "	. . . .	XXX—XXXVI.
	{	PAULI         "	. . . .	XIV—XVI.
4	{	ULPIANI ad edictum	. . . .	XXVI—XXX.
5	{	PAULI         "	. . . .	XXVIII—XXXI.
6	{	GAI           "       prouinciale	. . . .	IX, X init.
7	{	PAULI breuium	. . . .	VI.
	{	ULPIANI ad edictum	. . . .	XXXI, XXXII.
	{	PAULI         "	. . . .	XXXII—XXXIV.
	{	GAI           "       prouinciale	. . . .	X fin.
	{	ULPIANI       "	. . . .	XXXIII, XXXIV.
	{	PAULI         "	. . . .	XXXV—XXXVII.
	{	GAI           "       prouinciale	. . . .	XI.
	{	PAULI breuium	. . . .	VII.
	{	ULPIANI ad edictum	. . . .	XXXV, XXXVI.
	{	PAULI         "	. . . .	XXXVIII.
	{	"       breuium	. . . .	VIII.
	{	GAI ad edictum prouinciale	. . . .	XII.
	{	ULPIANI       "	. . . .	XXXVII, XXXVIII.
	{	PAULI         "	. . . .	XXXIX, XL.
	{	GAI           "       prouinciale	. . . .	XIII, XIV init.
	{	ULPIANI ad edictum	. . . .	XXXIX—XLV.
	{	PAULI         "	. . . .	XLI—XLIII init.
	{	GAI           "       prouinciale	. . . .	XIV fin., XV.
	{	ULPIANI ad edictum	. . . .	XLVI—L.
	{	PAULI         "	. . . .	XLIII fin.—XLVI.
	{	GAI           "       prouinciale	. . . .	XVI, XVII.
8	{	" <i>de testamentis</i> ad edict. praet. urbani	. . . .	I, II.
	{	ULPIANI ad edictum	. . . .	LI.
	{	PAULI         "	. . . .	XLVII, XLVIII init.
	{	GAI           "       prouinciale	. . . .	XVIII.
9	{	" <i>de legatis</i> ad edictum praetoris	. . . .	I—III.
10	{	ULPIANI disputationum	. . . .	I—X.



libb.

11	ULPIANI de omnibus tribunalibus . . . . .	I—X.
12	„ opinionum . . . . .	I—VI.
13	„ de censibus . . . . .	I—VI.
14	IULIANI digestorum . . . . .	I—XC.
15	ALFENI UARI digestorum . . . . .	I—XXX.
16	PAULI <i>epitomarum Alfeni digestorum</i> . . . . .	I—VIII.
17	IULIANI de ambiguitatibus . . . . .	lib. sing.
18	„ ad Urseium Ferocem . . . . .	I—IV.
19	„ ex Minicio . . . . .	I—VI.
20	AFRICANI quaestiones . . . . .	I—IX.
21	FLORENTINI institutionum . . . . .	I—V.
22	MARCIANI „ . . . . .	I, II.
23	ULPIANI „ . . . . .	I.
24	GAI „ . . . . .	I.
25	„ aureorum . . . . .	I.
26	PAULI institutionum . . . . .	I.
	FLORENTINI institutionum . . . . .	VI.
	MARCIANI „ . . . . .	III.
	GAI „ . . . . .	II.
	„ aureorum . . . . .	II.
27	CALLISTRATI institutionum . . . . .	II.
	MARCIANI institutionum . . . . .	IV—IX.
	FLORENTINI „ . . . . .	X, XI.
	ULPIANI „ . . . . .	II.
	FLORENTINI institutionum . . . . .	VII—IX.
	GAI institutionum . . . . .	III.
	„ aureorum . . . . .	III.
	PAULI institutionum . . . . .	II.
	CALLISTRATI institutionum . . . . .	III.
	MARCIANI „ . . . . .	X—XVI.
28	ULPIANI de adulteriis . . . . .	I—III.
29	PAPINIANI „ . . . . .	I, II.
30	„ „ . . . . .	lib. sing.
31	PAULI „ . . . . .	I, II.
	ULPIANI „ . . . . .	IV, V.
	PAULI „ . . . . .	III.
32	ULPIANI de sponsalibus . . . . .	lib. sing.
33	PAULI <i>de dotis repetitione</i> . . . . .	„
34	„ <i>de adsignatione libertorum</i> . . . . .	„
35	„ <i>de iure patronatus</i> . . . . .	„
36	NERATI regularum . . . . .	I—XV.
37	ULPIANI „ . . . . .	I—VII.
38	SCAEVOLAE „ . . . . .	I—IV.
39	PAULI „ . . . . .	lib. sing.

			libb.
40	MARCIANI regularum	. . . . .	I, II.
41	ULPIANI responsorum	. . . . .	I, II.
	MARCIANI regularum	. . . . .	III, IV.
42	PAULI	„ . . . . .	I—VII.
	MARCIANI	„ . . . . .	V.
43	POMPONI	„ . . . . .	lib. sing.
44	ULPIANI	„ . . . . .	lib. sing.
45	ULPIANI de officio proconsulis	. . . . .	I—X.
46	PAULI ad Sc. Silanianum	. . . . .	lib. sing.
47	„ de portionibus quae liberis damna-		
	torum conceduntur	. . . . .	lib. sing.
48	„ ad legem Iuliam	. . . . .	I, II.
49	„ de conceptione formularum	. . . . .	lib. sing.
50	MACRI publicorum iudiciorum	. . . . .	I, II.
51	UENULEI SATURNINI de iudiciis publicis	. . . . .	I—III.
52	PAULI	„ „ . . . . .	lib. sing.
53	MARCIANI de publicis iudiciis	. . . . .	I, II.
54	MAECIANI	„ „ . . . . .	I—XIV.
55	{ MARCIANI ad formulam hypothecariam	. . . . .	lib. sing.
56	{ GAI de formula hypothecaria	. . . . .	„
57	MARCELLI responsorum	. . . . .	„
58	NERATI membranarum	. . . . .	I—VII.
59	MACRI de officio praesidis	. . . . .	I, II.
60	ARCADI CHARISI de testibus	. . . . .	lib. sing.
61	MARCIANI de delatoribus	. . . . .	„
62	{ ULPIANI de appellationibus	. . . . .	I, II.
63	{ MACRI	„ . . . . .	I.
64	{ MARCIANI	„ . . . . .	I.
	{ ULPIANI	„ . . . . .	III, IV.
	{ MACRI	„ . . . . .	II.
	{ MARCIANI	„ . . . . .	II.
65	PAULI	„ . . . . .	lib. sing.
66	RUTILI MAXIMI ad legem Falcidiam	. . . . .	„
67	PAULI ad legem Fufiam Caninianam	. . . . .	„
68	„ ad legem Aeliam Sentiam	. . . . .	I—III.
69	ULPIANI ad legem Aeliam Sentiam	. . . . .	I—IV.
70	PAULI de libertatibus dandis	. . . . .	lib. sing.
71	„ de liberali causa	. . . . .	„
72	„ de secundis tabulis	. . . . .	„
73	„ de iure codicillorum	. . . . .	„
74	„ de centumviralibus iudiciis	. . . . .	„
75	„ de adulteriis	. . . . .	„
76	„ de senatus consultis	. . . . .	„
77	„ ad Sc. Uelleianum	. . . . .	„

		libb.
78	PAULI de intercessionibus feminarum .	lib. sing.
79	„ ad orationem diui Antonini et Com- modi . . . . .	„
80	„ de excusationibus tutelarum . . . . .	„
81	„ ad orationem diui Seueri . . . . .	„
82	„ de uariis lectionibus . . . . .	„
83	ULPIANI <i>pandectarum</i> . . . . .	„
84	MACRI de re militari . . . . .	I, II.
85	PAULI de poenis militum . . . . .	lib. sing.
86	ULPIANI de officio curatoris rei publicae .	„
87	„ de officio consularium . . . . .	„
88	PAULI de officio proconsulis . . . . .	I, II.
89	UENULEI „ „ . . . . .	I, IV.
90	CLAUDI SATURNINI de poenis paganorum .	lib. sing.
91	UOLUSI MAECIANI <i>ex lege Rhodia</i> . . . .	„
92	IAUOLENUS <i>ex posterioribus Labeonis</i> . .	I—X.

## PARS EDICTALIS.

{	ULPIANI ad edictum . . . . .	I—VI.
{	PAULI „ . . . . .	I—V.
{	GAI „ prouinciale . . . . .	I.
{	ULPIANI „ . . . . .	VII.
{	PAULI „ . . . . .	VI, VII.
{	GAI „ prouinciale . . . . .	II.
{	ULPIANI „ . . . . .	VIII—X init.
{	PAULI „ . . . . .	VIII—X.
{	GAI „ prouinciale . . . . .	III.
{	ULPIANI „ . . . . .	x fin.—XII.
{	PAULI „ . . . . .	XI, XII init.
{	GAI „ prouinciale . . . . .	IV.
{	PAULI breuium . . . . .	III.
{	ULPIANI ad edictum . . . . .	XIII, XIV.
{	PAULI „ . . . . .	XII fin.—XVI.
{	GAI „ prouinciale . . . . .	v init.
{	ULPIANI „ . . . . .	xv, xvi init.
{	PAULI „ . . . . .	XX.
{	GAI „ prouinciale . . . . .	v fin., VI.
{	ULPIANI „ . . . . .	xvi fin., XVII.
{	PAULI „ . . . . .	XIX—XXI.
{	GAI „ prouinciale . . . . .	VII.
{	ULPIANI „ . . . . .	XVIII.
{	PAULI „ . . . . .	XXII.
{	GAI „ prouinciale . . . . .	VII.



libb.

	ULPIANI ad edictum . . . . .	XIX.
	PAULI       " . . . . .	XXIII.
	GAI         "       prouinciale . . . . .	VII.
	ULPIANI     " . . . . .	XX, XXI.
	PAULI       " . . . . .	XXIV.
	GAI         "       prouinciale . . . . .	VII.
	GAI         "       " . . . . .	VIII.
	ULPIANI     " . . . . .	XXI, XXII.
	PAULI       " . . . . .	XXV, XVII, XVIII.
	GAI         "       prouinciale . . . . .	v fin.
	ULPIANI     " . . . . .	XXIII.
	PAULI       " . . . . .	XVIII, XIX.
	GAI         "       prouinciale . . . . .	VI.
	ULPIANI     " . . . . .	XXIV.
	PAULI       " . . . . .	XXV, XXVI.
	GAI         "       prouinciale . . . . .	VIII.
	ULPIANI     " . . . . .	XXV.
	PAULI       " . . . . .	XXVII.
93	GAI         "       prouinciale . . . . .	VIII, XIX.
	"         "       praetoris urbani . . . . .	
	ULPIANI     " . . . . .	LVI.
	PAULI       " . . . . .	LIV.
	GAI         "       prouinciale . . . . .	XXI.
	ULPIANI     " . . . . .	LVII.
	PAULI       " . . . . .	LV.
	GAI         "       prouinciale . . . . .	XXII.
	ULPIANI     " . . . . .	LVIII, LIX.
	PAULI       " . . . . .	LVI, LVII init.
94	GAI         "       prouinciale . . . . .	XXII.
	"         "       praetoris urbani <i>titulo</i>	
	<i>qui neque sequantur neque ducantur.</i>	
	ULPIANI ad edictum . . . . .	LX.
	PAULI       " . . . . .	LVII fin.
	GAI         "       prouinciale . . . . .	XXIII.
	ULPIANI     " . . . . .	LXI.
	PAULI       " . . . . .	LVIII.
	GAI         "       prouinciale . . . . .	XXIII.
	ULPIANI     " . . . . .	LXII.
	PAULI       " . . . . .	LIX.
	"       breuium . . . . .	XVI.
	GAI ad edictum prouinciale . . . . .	XXIII.
	ULPIANI ad edictum . . . . .	LXIII.
	PAULI       " . . . . .	LX.
	"       breuium . . . . .	XVI.
	GAI ad edictum prouinciale . . . . .	XXIV.

libb.

95	{	ULPIANI ad edictum . . . . .	LXIV, LXV.
		PAULI       " . . . . .	LXI.
		ULPIANI       " . . . . .	LXVI.
		PAULI       " . . . . .	LXII.
		"       breuium . . . . .	XVI.
		GAI ad edictum prouinciale . . . . .	XXIV.
		"       "       praetoris urbani <i>titulo de</i> <i>re iudicata.</i>	
		ULPIANI ad edictum . . . . .	LXVII.
		PAULI       " . . . . .	LXIII.
		GAI       "       prouinciale . . . . .	XXV.
		ULPIANI       " . . . . .	LXVIII.
		PAULI       " . . . . .	LXIV.
		GAI       "       prouinciale . . . . .	XXV.
		ULPIANI       " . . . . .	LXIX.
		PAULI       " . . . . .	LXV init.
		GAI       "       prouinciale . . . . .	XXV.
		ULPIANI       " . . . . .	LXX, LXXI init.
		PAULI       " . . . . .	LXV fin., LXVI.
		GAI       "       prouinciale . . . . .	XXV.
		ULPIANI       " . . . . .	LXXI fin.
96	{	PAULI       " . . . . .	LXVII.
		GAI       "       prouinciale . . . . .	XXVI.
		ULPIANI       " . . . . .	LXXII, LXXIII.
		PAULI       " . . . . .	LXVIII.
		GAI       "       prouinciale . . . . .	XXVI.
		ULPIANI       " . . . . .	LXXIV.
		PAULI       " . . . . .	LXIX.
		GAI       "       prouinciale . . . . .	XXIX.
		ULPIANI       " . . . . .	LXXV.
		PAULI       " . . . . .	LXX.
		ULPIANI       " . . . . .	LXXVI.
		PAULI       " . . . . .	LXXI.
		GAI       "       prouinciale . . . . .	XXX.
		ULPIANI       " . . . . .	LXXVII, LXXVIII.
		PAULI       " . . . . .	LXXII—LXXIV.
		GAI       "       prouinciale . . . . .	XXVII.
		ULPIANI       " . . . . .	LXXIX.
		PAULI       " . . . . .	LXXV, LXXVI.
		GAI       "       prouinciale . . . . .	XXVII.
		ULPIANI       " . . . . .	LXXX, LXXXI.
97	{	PAULI       " . . . . .	LXXVII, LXXVIII.
		GAI       "       prouinciale . . . . .	XXVIII.
		ULPIANI       " <i>aedilium curulium</i> . . . . .	I, II.
98	{	PAULI       "       " . . . . .	"
98	{	GAI       "       " . . . . .	"

libb.

- 99 ΠαπινIANOÛ ἀστυνομικὸς μονοβιβλος.
- { ULPIANI ad edictum . . . . . LIV, LV init.
  - { PAULI           " . . . . . L, LI.
  - { GAI           "       prouinciale . . . . . XX.
- 100 GAI           "       praetoris urbani *titulo*  
*de liberali causa.*
- { ULPIANI ad edictum . . . . . LV fin.
  - { PAULI           " . . . . . LII.
  - { GAI           "       prouinciale . . . . . XXI.
- 101 "           "       praetoris urbani *titulo*  
*de publicanis.*
- { ULPIANI ad edictum . . . . . LII, LIII.
  - { PAULI           " . . . . . XLVIII fin., XLIX.
  - { GAI           "       prouinciale . . . . . XIX.
- 102 "           "       praet. urb. *titulo de*  
*op. nou. nunt.*
- 103 "       *de damn. infect.*
- 104 "       *de aquae plu. arc.*
- 105 GAI ad edict. pr. urb. *de praedicatoribus.*
- 106 PAULI ad Plautium . . . . . I—XIV.
- 107 IAUOLENI       " . . . . . I.
- 108 POMPONI       " . . . . . I.
- IAUOLENI       " . . . . . II.
- POMPONI       " . . . . . II, III.
- PAULI       " . . . . . XV—XVIII.
- IAUOLENI       " . . . . . III—V.
- POMPONI       " . . . . . IV—VII.
- 109 PAULI ad Uitellium . . . . . I—IV.
- 110 "       *de iure fisci* . . . . . I, II.
- 111 CELSI digestorum . . . . . I—IV.
- 112 MARCELLI       " . . . . . I—III.
- CELSI       " . . . . . V.
- MARCELLI       " . . . . . IV.
- CELSI       " . . . . . VI—VIII.
- MARCELLI       " . . . . . V, VI.
- { CELSI       " . . . . . IX—XII.
- { MARCELLI       " . . . . . VII, VIII.
- CELSI       " . . . . . XIII—XVI.
- MARCELLI       " . . . . . IX—XII.
- CELSI       " . . . . . XVII—XXI.
- MARCELLI       " . . . . . XIII—XV.
- CELSI       " . . . . . XXII.
- MARCELLI       " . . . . . XVI.
- CELSI       " . . . . . XXIII.
- MARCELLI       " . . . . . XVII.



		libb.
	CELSI digestorum . . . . .	XXIV—XXVII.
	MARCELLI „ . . . . .	XVIII—XXI.
	CELSI „ . . . . .	XXVIII—XXXV.
	MARCELLI „ . . . . .	XXII—XXIX.
	CELSI „ . . . . .	XXXVI—XXXIX.
	MARCELLI „ . . . . .	XXX, XXXI.
113	ULPIANI de officio consulis . . . . .	I—III.
114	MODESTINI differentiarum . . . . .	I—IX.
115	„ de manumissionibus . . . . .	lib. sing.
116	„ regularum . . . . .	I—X.
117	„ de ritu nuptiarum . . . . .	lib. sing.
118	„ de differentia dotis . . . . .	„
119	„ excusationum . . . . .	I—VI.
120	ULPIANI de officio praetoris tutelar. . . . .	lib. sing.
121	„ <i>excusationum</i> . . . . .	„
122	MODESTINI <i>de praescriptionibus</i> . . . . .	I—IV.
123	„ responsorum . . . . .	I—XIX.
124	„ de enucleatis casibus . . . . .	lib. sing.
125	„ de praescriptionibus . . . . .	„
126	„ pandectarum . . . . .	I—XII.
127	„ de heurematicis . . . . .	lib. sing.
128	„ de inofficioso testamento . . . . .	„
129	IAVOLENI ex Cassio . . . . .	I—XV.
130	„ epistularum . . . . .	I—XIV.
131	POMPONI ad Quintum Mucium . . . . .	I—XXXIX.
132	PROCULI epistularum . . . . .	I—VI.
133	POMPONI uariarum lectionum . . . . .	I—XV.
	PROCULI epistularum . . . . .	VII—XI.
134	CALLISTRATI de iure fisci . . . . .	I—IV.
135	PAULI de censibus . . . . .	I, II.
136	CALLISTRATI de cognitionibus . . . . .	I—VI.
137	TERTULLIANI quaestionum . . . . .	I—VIII.
138	ULPIANI ad legem Iuliam et Papiam . . . . .	I.
139	PAULI „ „ . . . . .	I.
	{ ULPIANI „ „ . . . . .	II—V.
	{ PAULI „ „ . . . . .	II—V.
140	GAI „ „ . . . . .	I, II.
	{ ULPIANI „ „ . . . . .	VI—XV.
	{ PAULI „ „ . . . . .	VI—X.
141	{ TERENCE CLEMENTIS „ „ . . . . .	I—XX.
	{ GAI „ „ . . . . .	III—XV.
142	{ MAURICIANI „ „ . . . . .	II, III.
143	MARCELLI „ „ . . . . .	I—III.
	ULPIANI „ „ . . . . .	XVI—XX.

	libb.
144 MACRI ad legem uicesimam hereditatium . . . .	I, II.
145 GAI <i>ad legem Glitiam</i> . . . .	lib. sing.
146 PAULI ad legem Cinciam . . . .	„
147 ARRII MENANDRI de re militari . . . .	I—IV.
148 TARRUNTENI PATERNI „ . . . .	I—IV.
149 TERTULLIANI de castrensi peculio . . . .	lib. sing.
150 MODESTINI de poenis . . . .	I—IV.
151 LICINI RUFINI regularum . . . .	I—IV.
152 CALLISTRATI edicti monitorii . . . .	I—IV.
LICINI RUFINI regularum . . . .	VIII—XII.
153 PAPIRI IUSTI de constitutionibus . . . .	I—XX.
154 AELI GALLI <i>de uerborum quae ad ius pertinent significatione</i> . . . .	I.
155 IULI AQUILAE responsorum . . . .	lib. sing.

## PARS PAPINIANA.

156 PAPINIANI quaestionum . . . .	I—XXXVII.
157 „ responsorum . . . .	I—XIX.
158 „ definitionum . . . .	I, II.
159 { PAULI quaestionum . . . .	I—III.
160 { SCAEUOLAE „ . . . .	I, II.
{ PAULI „ . . . .	IV—VIII.
{ SCAEUOLAE „ . . . .	III—VI.
{ PAULI „ . . . .	IX—XI.
{ SCAEUOLAE „ . . . .	VII—IX.
{ PAULI „ . . . .	XII—XIV.
{ SCAEUOLAE „ . . . .	X—XII.
{ PAULI „ . . . .	XV.
{ SCAEUOLAE „ . . . .	XIII.
{ PAULI „ . . . .	XVI—XX.
{ SCAEUOLAE „ . . . .	XIV—XVIII.
{ PAULI „ . . . .	XXI—XXVI.
{ SCAEUOLAE „ . . . .	XIX, XX.
161 CALLISTRATI quaestionum . . . .	I, II.
162 PAULI responsorum . . . .	I—VII.
163 SCAEUOLAE „ . . . .	I.
PAULI „ . . . .	VIII—XV.
SCAEUOLAE „ . . . .	II—IV.
PAULI „ . . . .	XVI—XIX.
SCAEUOLAE „ . . . .	V.
PAULI „ . . . .	XX—XXIII.
SCAEUOLAE „ . . . .	VI.

libb.

164	Ualentis fideicommissorum . . . . .	I—IV.
165	Ulpiani „ . . . . .	I—IV.
166	Maeciani „ . . . . .	I—VIII.
167	Gai „ . . . . .	I, II.
168	Pauli „ . . . . .	I, II.
169	Pomponi „ . . . . .	I, II.
	{ Maeciani „ . . . . .	IX—XVI.
	{ Ualentis „ . . . . .	V—VII.
	{ Pomponi „ . . . . .	III—V.
	{ Ulpiani „ . . . . .	V, VI.
	{ Pauli „ . . . . .	III.
170	„ sententiarum . . . . .	I init.
171	Hermodeniani iuris epitomarum . . . . .	I.
	Pauli sententiarum . . . . .	I fin., II.
	Hermodeniani iuris epitomarum . . . . .	II.
	Pauli sententiarum . . . . .	III.
	Hermodeniani iuris epitomarum . . . . .	III.
	Pauli sententiarum . . . . .	IV.
	Hermodeniani iuris epitomarum . . . . .	IV.
	Pauli sententiarum . . . . .	V.
	Hermodeniani iuris epitomarum . . . . .	V, VI.
172	Gai de casibus . . . . .	lib. sing.
173	Uenulei stipulationum . . . . .	I—XIX.
174	Nerati responsorum . . . . .	I—III.
175	Pauli ad Neratium . . . . .	I—IV.
176	Tryphonini disputationum . . . . .	I—XII.
177	Pauli manualium . . . . .	I, II.
	Tryphonini disputationum . . . . .	XIII—XXI.
178	Pauli decretorum . . . . .	I—III.
179	Gai <i>regularum</i> . . . . .	I—III.
180	„ <i>regularum</i> . . . . .	lib. sing.
181	Pauli <i>de cognitionibus</i> . . . . .	„
182	„ <i>de concurrentibus actionibus</i> . . . . .	„
183	„ <i>de usuris</i> . . . . .	„
184	„ <i>ad Sc. Turpilianum</i> . . . . .	„
185	Marciani <i>ad Sc. Turpilianum</i> . . . . .	„
186	Pauli <i>ad Sc. Libonianum</i> . . . . .	„
187	„ <i>ad Sc. Claudianum</i> . . . . .	„
188	„ <i>de poenis omnium legum</i> . . . . .	„
189	„ <i>de poenis paganorum</i> . . . . .	„
190	„ <i>ad regulam Catonianam</i> . . . . .	„
191	„ <i>de forma testamenti</i> . . . . .	„
192	„ <i>de inofficioso testamento</i> . . . . .	„
193	„ <i>de tacitis fideicommissis</i> . . . . .	„



		libb.
194	PAULI de instrumenti significatione . . .	lib. sing.
195	„ ad Sc. Tertullianum . . .	„
196	„ ad Sc. Orfitianum . . .	„
197	„ ad legem Falcidiam . . .	„
198	GAI de tacitis fideicommissis . . .	„
199	„ ad Sc. Tertullianum . . .	„
200	„ ad Sc. Orfitianum . . .	„
201	„ de manumissionibus . . .	I—III.
202	„ de uerborum obligationibus . . .	I—III.
203	„ ad legem duodecim tabularum . . .	I—VI.
204	POMPONI enchiridi . . .	I, II.
205	„ <i>enchiridi</i> . . .	lib. sing.
206	PAULI de iure libellorum . . .	„
207	„ de articulis liberalis causae . . .	„
208	„ de iuris et facti ignorantia . . .	„
209	„ de iure singulari . . .	„
210	„ de gradibus et adfinibus et nomini- bus eorum . . .	„
211	„ de officio adsectorum . . .	„
212	„ de officio praefecti uigilum . . .	„
213	ULPIANI „ „ . . .	„
214	„ de officio praefecti urbi . . .	„
215	PAULI „ „ . . .	„
216	ARCADI CHARISI de muneribus ciuilibus . . .	„
217	AUR. ARCADI CHARISI de officio praefecti praetorio . . .	„
218	ULPIANI de officio quaestoris . . .	„

N.B. The place in the lists of the last seven books is not ascertained.

#### APPENDIX PARTIS PAPINIANAE.

219	PAULI imperialium sententiarum in cog- nitionibus prolatarum . . .	I—VI.
220	QUINTI MUCI SCAEUOLAE <i>ῥπων</i> . . .	lib. sing.
221	LABEONIS posteriorum a Iauoleno epitoma- torum . . .	I—X.
222	PROCULI <i>ex posterioribus Labeonis</i> . . .	I—III.
223	SCAEUOLAE digestorum <sup>1</sup> . . .	I—XL.
224	LABEONIS pithanon a Paulo epitomatorum . . .	I—VIII.
225	POMPONI epistularum . . .	I—XX.
226	„ S. consultorum . . .	I—V.

<sup>1</sup> Sometimes before, sometimes after, LABEONIS Pithana.

227	SCAEVOLAE quaestionum publice tracta-	
	tarum . . . . .	lib. sing.
228	Ualentis <i>actionum</i> . . . . .	I—VII.
229	Uenulei Saturnini <i>actionum</i> . . . . .	I—X.
230	„ „ <i>interdictorum</i> . . . . .	I—X.
231	Furi Anthiani <i>ad edictum</i> . . . . .	I.

The above-named 231 works are thus accounted for.

In the Florentine Index there are named . . . . . 206 works.

Of these, the following are not represented in the Digest :

SABINI	de iure ciuili libri tres	
SCAEVOLAE	de quaestione familiae lib. sing.	
GAI	dotalicion βιβλίον ἓν	
ULPIANI	Πανδέκτων βιβλία δέκα	
PAULI	de officio praetoris tutelaris lib. sing.	
„	de extraordinariis criminibus lib. sing.	
„	ὑποθηκάρια μονοβιβλος	
„	ad municipalem lib. sing.	
„	ad legem Uellaeam lib. sing.	
„	de iure patronatus quod ex lege Iulia et Papia uenit lib. sing.	
„	de actionibus lib. sing.	
„	de donationibus inter uirum et uxorem lib. sing.	
„	de legibus lib. sing.	
„	de legitimis hereditatibus lib. sing.	
MODESTINI	de legatis et fideicommissis lib. sing.	
„	de testamentis lib. sing.	

Deduct these . . . . . 16

Separate treatises named in Index and represented in Digest 190

Add, not named in Index at all . . . . . 27

named under other heads, viz. :

<i>Gai ad edictum aedil. curul.</i> (with 'ad edictum')	}	4
<i>Ulpiani</i> „ „ „		
<i>Pauli</i> „ „ „		
„ <i>ad Sc. Claudianum</i> (with 'Libonianum')		

titles (out of 'Gai ad Edict. pr. urb.') separately named here . . . . . 10

Number of Works from which extracts appear in the Digest . . . . . 231

## APPENDIX C.

### PROPORTION IN WHICH THE SEVERAL JURISTS WERE USED TO FORM THE DIGEST.

The proportion, in which the several jurists were used in order to form the Digest, is here given according to my own calculation. The figures differ slightly from those given in other books.

In counting the pages of Hommel's *Palingenesia*, I have omitted all extracts not taken from the Digest, and all citations as distinguished from extracts. These citations are properly included in the extracts of the author citing them, and cannot therefore also be included among the extracts of the author cited. Hence my estimate differs from that given in the *Dict. Antiqq.* The amount of print in each page of Hommel is not the same when the extracts are short, as when they are long and continuous, so that the estimate must be regarded as only approximate. (Five of Hommel's pages contain about as much matter as three of Mommsen's stereotype edition.)

In counting the extracts I have not resorted to Hommel, but to the Digest itself in Mommsen's stereotype edition. I have followed the inscriptions as there given, without conjectural alteration. But such extracts as xxxiii. 4. l 13 I count as Paul's, not Labeo's; xxxix. 6. l 15: xlix. 17. l 10 &c., I have referred to Marcellus, not to Julian or Pomponius; xlviii. 5. l 8 (Mommsen) I count as Marcian's; l 9 as Papinian's. The extracts from Saturninus (xl. 16. l 2) and Claudius Saturninus (xlviii. 19. l 16) I have counted with those of Venuleius. The numbers here given differ but slightly from those given by others, e.g. Rudorff, and may well be accounted for by the changes in Mommsen's edition: but as he gives Pomponius 7 more and Marcianus 8 less, I have in their case verified my figures by counting again.

	Number of Hommel's pages.	Extracts.
Ulpianus . . . . .	590	2464
Paulus . . . . .	268½	2081
Papinianus . . . . .	92	601
Scaeuola . . . . .	74½	306
Pomponius . . . . .	70½	578
Iulianus . . . . .	68	456
Gaius . . . . .	63	535



	Number of Hommel's pages.	Extracts.
Modestinus . . . . .	40 $\frac{1}{2}$	344
Marcianus . . . . .	36 $\frac{1}{2}$	283
Iaolenus . . . . .	23	206
Africanus . . . . .	23	131
Marcellus . . . . .	21	161
Tryphoninus . . . . .	18 $\frac{1}{2}$	80
Callistratus . . . . .	15	101
Celsus . . . . .	14	141
Uenuleius (including Cl. Saturninus)	11	72
Macer . . . . .	10	65
Hermogenianus . . . . .	9 $\frac{1}{2}$	107
Labeo . . . . .	9	61
Alfenus . . . . .	9	54
Neratius . . . . .	7 $\frac{1}{2}$	63
Maecianus . . . . .	7 $\frac{1}{2}$	44
Proculus . . . . .	6	37
Florentinus . . . . .	4	42
Terentius Clemens . . . . .	3 $\frac{1}{2}$	35
Ualens . . . . .	3	20
Arcadius . . . . .	2 $\frac{1}{2}$	6
Papirius Iustus . . . . .	2	18
Menander . . . . .	2	6
Licinius Rufinus . . . . .	1	17
Tertullianus . . . . .	1	5
Iun. Mauricianus . . . . .	1	4
Furius Anthianus . . . . .	$\frac{1}{3}$	3
Q. Mucius . . . . .	$\frac{1}{4}$	3
Tarruntenus . . . . .	$\frac{1}{4}$	2
Iul. Aquila . . . . .	$\frac{1}{6}$	2
Rutilius Maximus . . . . .	$\frac{1}{12}$	1
Aelius Gallus . . . . .	$\frac{1}{40}$	1
<i>Anonymous (in our MSS.)</i> . . . . .	$\frac{1}{2}$	5
Total . . . . . nearly	<hr/> 1510 <hr/>	<hr/> 9142 <hr/>

## APPENDIX D.

### CHRONOLOGICAL TABLE OF EMPERORS AND SOME PRINCIPAL EVENTS (from Rudorff, Fischer, &c.).

A. U. C.	B. C.	
1	753	Rome founded.
245	509	The first Consuls.
260	494	1st Secession of <i>Plebs</i> .
303—4	451—0	The Decemviri. XII Tables.
305	449	2nd Secession of <i>Plebs</i> .
311	443	Censorship established (A. U. C. 319 Mommsen).
337	367	<i>Leges Liciniae Sextiae</i> .
338	366	First <i>Praetor Urbanus</i> .
390	364	Rome taken by Gauls.
442	312	App. Claudius <i>ensor</i> .
450	304	Cn. Flavius publishes <i>formulae actionum</i> .
467	287	3rd Secession of <i>Plebs</i> .
490	264	1st Punic war begins.
cir. 512	242	<i>Praetor inter peregrinos</i> .
513	241	<i>Sicilia</i> the first Roman province.
		End of 1st Punic war.
523	231	<i>Sardinia</i> made province.
527	227	First Provincial <i>Praetors</i> .
536	218	2nd Punic war begins.
538	216	Battle of Cannae.
550	204	<i>Lex Cincia</i> .
553	201	End of 2nd Punic war.
557	197	<i>Hispania citerior</i> and <i>ulterior</i> made provinces.
570	184	M. Porcius Cato <i>Censor</i> .
585	169	<i>Lex Uoconia</i> .
after 587	167	<i>Illyricum</i> made province.
605	149	3rd Punic war begins.
		M' Manilius <i>cos</i> .

A. U. C.	B. C.	
608	146	Carthage destroyed.
		<i>Africa</i>
		<i>Macedonia</i> } made provinces.
		<i>Achaia</i> }
621	133	Tib. Gracchus killed.
		P. Mucius Scaeuola <i>cos.</i>
		<i>Asia</i> made province.
631	123	C. Gracchus killed.
634	120	<i>Gallia Narbonensis</i> made province.
637	117	Q. Mucius Scaeuola (augur) <i>cos.</i>
639	115	M. Aemilius Scaurus <i>cos.</i>
649	105	P. Rutilius Rufus <i>cos.</i>
652—3	102—1	Marius defeats Teutones and Cimbri.
652	102	<i>Cilicia</i> treated as province (organised A. U. C. 687).
659	95	L. Licinius Crassus
		Q. Mucius Scaeuola (pontifex) } <i>cos.</i>
663	91	Social war begins.
666	88	Social war ends.
672	82	Sulla <i>dictator. Leges Corneliae</i> (before 675).
673	81	<i>Gallia Cisalpina</i> made province.
675	79	Sulla retires.
680	74	<i>Bithynia, Cyrene</i> , made provinces.
687	67	<i>Creta</i> made province.
688	66	C. Aquilius <i>praetor.</i>
690	64	<i>Syria</i> made province.
691	63	M. Tullius Cicero <i>cos.</i>
694	60	Triumvirate of Caesar, Pompey and Crassus.
695	59	C. Iulius Caesar <i>cos.</i>
702	52	Milo kills Clodius.
703	51	Ser. Sulpicius <i>cos.</i>
705	49	CAESAR crosses Rubicon.
		<i>Lex Rubria</i> (before 712).
706	48	Battle of Pharsalus.
709	45	<i>Lex Iulia municipalis.</i>
710	44	Caesar is killed.
711	43	Triumvirate of Octavius, Antony and Lepidus.
		Cicero is killed.
712	42	Battle of Philippi.
714	40	<i>Lex Falcidia.</i>
723	31	Battle of Actium.
724	30	<i>Aegyptus</i> made province.
725	29	Octavian receives <i>ius trib.</i> and <i>imperium</i> for life. <i>Trib. pot.</i> part of his title, first in 731.



A. U. C.	B. C.	
727	27	Octavian called AUGUSTUS.
736	18	<i>Leges Iuliae de adulteriis et de maritandis ordinibus</i> passed by Senate.
751	3	} Birth of Christ.
	A.D.	
754	1	
757	4	<i>Lex Aelia Sentia.</i>
758	5	C. Ateius Capito <i>cos.</i>
761	8	<i>Lex Fufia Caninia.</i>
762	9	<i>Lex Papia Poppaea.</i>
763	10	<i>Sc. Silanianum.</i>
767	14	TIBERIUS <i>imp.</i>
772	19	<i>Lex Iunia Norbana.</i>
780	27	<i>Lex Iunia Uellaea.</i>
783	30	C. Cassius Longinus <i>cos. suff.</i>
786	33	M. Cocceius Nerva dies.
790	37	CALIGULA <i>imp.</i>
794	41	CLAUDIUS <i>imp.</i>
799	46	<i>Sc. Uelleianum.</i>
807	54	NERO <i>imp.</i>
809	56	<i>Sc. Trebellianum.</i>
817	64	Burning of Rome.
818	65	Conspiracy of Piso.
821	68	GALBA <i>imp.</i>
822	69	OTHO <i>imp.</i>
		UITELLIUS <i>imp.</i>
		UESPASIANUS <i>imp.</i>
823	70	Destruction of Jerusalem.
832	79	TITUS <i>imp.</i>
834	81	DOMITIANUS <i>imp.</i>
849	96	NERVA <i>imp.</i>
851	98	TRAIANUS <i>imp.</i>
859	106	<i>L. Minicius Natalis cos.</i>
870	117	HADRIANUS <i>imp.</i>
882	129	P. Iuuentius Celsus <i>cos.</i>
		<i>Sc. Iuuentianum.</i>
891	138	ANTONINUS PIUS <i>imp.</i>
		M. Uindius Uerus } <i>cos. suff.</i>
		Pactumeius Clemens }
914	161	M. AURELIUS } <i>impp.</i>
		L. UERUS }
922	169	Verus dies.
930	177	M. Aurelius } <i>impp.</i>
		COMMODUS }

A. U. C.	A. D.	
931	178	<i>Sc. Orfitianum.</i>
933	180	Commodus alone <i>imp.</i>
945	192	PERTINAX <i>imp.</i>
946	193	DIDIUS IULIANUS <i>imp.</i>
		SEPTIMIUS SEVERUS <i>imp.</i>
951	198	with CARACALLA.
965	212	Severus dies.
		Caracalla at first with GETA <i>impp.</i>
		Papinian killed.
970	217	MACRINUS <i>imp.</i>
971	218	ELAGABALUS <i>imp.</i>
975	222	ALEXANDER SEVERUS <i>imp.</i>
981	228	Ulpian killed.
988	235	MAXIMINUS <i>imp.</i>
991	238	GORDIANUS I. <i>imp.</i>
		GORDIANUS II. <i>imp.</i>
		GORDIANUS III. <i>imp.</i>
977	244	PHILIPPUS <i>imp.</i>
	249	DECIUS <i>imp.</i>
	252	GALLUS
		UOLUSIANUS } <i>impp.</i>
	252	UALERIANUS
		GALLIENUS } <i>impp.</i>
	260	Valerian dies.
	268	CLAUDIUS <i>imp.</i>
	270	AURELIANUS <i>imp.</i>
	275	TACITUS <i>imp.</i>
	276	PROBUS <i>imp.</i>
	282	CARUS
		CARINUS
		NUMERIANUS } <i>impp.</i>
	283	Carus dies.
	284	DIOCLETIANUS <i>imp.</i>
	286	with MAXIMIANUS <i>imp.</i>
	305	CONSTANTIUS
		GALERIUS } <i>impp.</i>
	306	Galerius
		SEVERUS } <i>impp.</i>
307—8		Galerius
		LICINIUS
		MAXIMINUS
		Maximianus
		CONSTANTINUS
		MAXENTIUS

A. D.

310	Maximianus dies.
311	Galerius dies.
312	Maxentius dies.
313	Maximinus dies.
324	Licinius dies.
330	Constantinople the seat of Government.
337	CONSTANTINUS II.
	CONSTANTIUS } <i>impp.</i>
	CONSTANS }
340	Constantinus killed.
350	Constans killed.
355	Constantius } <i>impp.</i>
	IULIANUS }
361	Constantius dies.
363	IOULIANUS <i>imp.</i>

WEST.

EAST.

364	Ualentianus I. <i>imp.</i>	Ualens <i>imp.</i>
367	with GRATIANUS <i>imp.</i>	
375	Gratianus	
	Ualentianus II. } <i>impp.</i>	
379		THEODOSIUS I. <i>imp.</i>
384		with ARCADIUS } <i>impp.</i>
		and HONORIUS }
392	Theodosius over whole empire.	
395	HONORIUS <i>imp.</i>	ARCADIUS <i>imp.</i>
402		with THEODOSIUS II. <i>imp.</i>
408		Arcadius dies.
410	Alarich king of West Goths in Rome.	
425	Ualentianus III. <i>imp.</i>	
426	Law of citations. (Cf. p. lxxxiv.)	
439	<i>Codex Theodosianus</i> comes into force.	
450		MARCIANUS <i>imp.</i>
455	MAXIMUS <i>imp.</i>	
	AUITUS <i>imp.</i>	
456	MAIORIANUS <i>imp.</i>	
457		LEO I. <i>imp.</i>
461	SEUERUS <i>imp.</i>	
467	ANTHEMIUS <i>imp.</i>	
472	OLYBIUS <i>imp.</i>	
473	GLYCERIUS <i>imp.</i>	
474	NEPOS <i>imp.</i>	LEO II. <i>imp.</i>
		ZENO <i>imp.</i>
475	ROMULUS AUGUSTULUS <i>imp.</i>	



A. D.	WEST.	EAST.
476	ODOUACER.	
491		ANASTASIUS <i>imp.</i>
493	Theodoric king of East Goths in Italy.	
518		IUSTINUS I. <i>imp.</i>
527		IUSTINIANUS <i>imp.</i>
528		Code ordered.
529		Code published.
530		Digest ordered.
533		Digest Institutes } published.
		New Course of study.
534		Revision of Code.
565		Justinian dies.

ius & corpus. alienis rebus cannot have u. in one's own property, for nulla res etc. utendi fructu, not abutendi only owner has this. in corpore over a material thing: cannot be u. in an incorporeal thing.

iure legati doubtless the oldest way of creating u. heres institutus dare i.e. legacy per damnationem si instituit i.e. if subject the heir has not the proprietas as opp. to patritus if he has.

pactionibus et stipulationibus the other way of creating servitudes in J's time. agreement confirmed by stipulation. fundus = landed estate as opp. to aedes town dwelling. iumenta = beasts of burden, not cattle etc. which is pecus.

in universum may mean either 'generally' or 'completely, entirely'.

absentis is the opposite of accedo, ∴ to be withdrawn from, to be lacking.

placuit 'it has been determined' whether by arbitrate, judicial decision, or juristic opinion.

in multis rationibus 'in many respects', ∴ u. gives (a) exclusive possession (b) right to fruits & profits, & (c) in law often treated rather as part of ownership than as a servitude. But in other respects the usufructuary is not regarded as owner ∴ (a) cannot bequeath by will (b) or create servitudes, or (c) destroy the subject matter.

exstat is v. difficult. Roby takes it as meaning 'it (the u.) appears separately', i.e. <sup>as</sup> ~~the~~ separate legal phenomenon. But quid? Many hypotheses possible

vel praesens etc. 'it may be given to take effect immediately or from a future date.'

# DIGESTORUM JUSTINIANI AUGUSTI

## LIBRI SEPTIMI

### TIT. I.

#### DE USU FRUCTU ET QUEMADMODUM QUIS UTATUR FRUATUR.

##### *Character and Creation of Usufruct.*

*Usufruct  
defined.*

USUS fructus est ius alienis rebus utendi fruendi **1. PAUL.** ad  
salua rerum substantia. Est enim usus fructus ius in Uitell. III.  
corpore quo sublato et ipsum tolli necesse est. **2. CELSUS**  
Dig. XVIII.

*Consists in  
what?*

Omnium praediorum iure legati potest constitui **3. GAIUS**  
usus fructus, ut heres iubeatur dare alicui usum Rer. Cott.  
II.

*How extin-  
guished.*

fructum: dare autem intellegitur, si induxerit in *created*  
fundum legatarium, eumue patiatut uti frui. Et  
sine testamento autem si quis uelit usum fructum  
constituere, pactionibus et stipulationibus id efficere  
potest. Consistit<sup>1</sup> autem usus fructus non tantum in 1  
fundo et aedibus, uerum etiam in seruís et iumentis  
ceterisque rebus. Ne tamen in uniuersum inutiles 2  
essent proprietates semper abscedente usu fructu, pla-  
cuit certis modis extinguí usum fructum et ad pro-  
prietatem reuerti. Quibus autem modis usus fructus 3  
et constituitur<sup>2</sup> et finitur, isdem modis etiam nudus  
usus solet et constitui et finiri.

*May be  
part of  
ownership;*

Usus fructus in multis casibus pars dominii est, et **4. PAULUS**  
exstat, quod uel praesens uel ex die dari potest. ad edict. II.

<sup>1</sup> Ita aliquot dett.; constitit F.

<sup>2</sup> Ita dett.; constitit F.



of lapse of the statutory period of my prescription. (4) specialised use of res for the  
 who has made himself liable by contract (officiu res chilulandi), i.e. who has created a pactio  
antehabitus. As u. is deprecable, each heir is liable for a certain part of it, as far as his share goes.  
 16-17. § 2.

and may be divided. Usus fructus et ab initio<sup>(1)</sup> pro parte indiuisa uel diuisa<sup>(2)</sup> 5. PAP-  
 constitui et legitimo tempore<sup>(3)</sup> similiter amitti eademque INIANUS  
 ratione per legem Falcidiam minui potest: reo quoque Quaest. VII.  
 promittendi<sup>(4)</sup> defuncto in partes hereditarias usus fructus  
 obligatio diuiditur: et si ex communi praedio debeatur,  
 uno ex sociis<sup>(5)</sup> defendente pro parte defendentis fiet  
 restitutio. i.e. other common owners not liable by a judgment against one.

How created. Usus fructus pluribus modis constituitur: ut ecce, 6. GAIUS  
 si legatus fuerit. Sed et proprietas deducto usu ad edict. prou. VII.  
 fructu legari potest, ut apud heredem maneat usus  
 fructus. Constituitur adhuc usus fructus et in iudicio 1  
 familiae erciscundae<sup>(6)</sup> et communi diuidendo<sup>(7)</sup>, si iudex<sup>(8)</sup> a labor actione  
 alii proprietatem adiudicauerit, alii usum fructum. i.e. if any common property is  
 not a com. interest.

Adquiritur autem nobis usus fructus non solum 2  
 per nosmet ipsos, sed etiam per eas quoque personas,  
 quas iuri nostro subiectas<sup>6</sup> habemus. Nihil autem 3  
 uetat seruo meo herede instituto legari proprietatem  
 deducto usu fructu. i.e. legacy may be charged on him w. reservation of  
 u., wch. accordingly I take.

### Rights and Duties of Fructuary.

Usu fructu legato<sup>proh. applies to all usufructs</sup> omnis fructus rei ad fructua- 7. ULPI-  
 rium pertinet. Et aut rei soli aut rei mobilis usus ANUS ad  
 fructus legatur. Rei soli, ut puta aedium, usu fructu Sab. XVII.  
 legato, quicumque reditus est, ad usufructuarium per- 1-2. ab air.  
 tinet, quaeque obuentiones sunt ex aedificiis, ex areis, <sup>plots of land</sup>  
 et ceteris quaecumque aedium sunt. Unde etiam  
 mitti eum in possessionem uicinarum aedium<sup>(9)</sup> causa  
 damni infecti placuit, et iure domini possessurum eas  
 aedes, si perseueretur non cauere, nec quicquam amit-  
 tere finito usu fructu. Hac ratione Labeo scribit nec  
 aedificium licere domino te inuito altius tollere, sicut  
 nec areae usu fructu legato potest in area aedificium  
 poni: quam sententiam puto ueram.

Duty to repair. Quoniam igitur omnis fructus rei ad eum per- 2  
 tinet, reficere quoque eum aedes per arbitrum cogi  
 Celsus scribit<sup>1</sup> libro octauo decimo digestorum, hacte-

<sup>1</sup> scribit Celsus libro I.

when damage apprehended fr. neighboring house in ruinous condition owner refuses to give  
 security, then praetor will give this order. In the present case, if the owner continues to refuse security  
 usufructuary ed. acquire ownership of the neighboring house (i.e. sub possessione apud a time uich.  
 & into ownership) i.e. the acquisition regarded as a fructus.

fructuary [to continue] to use it', i.e. assuming that the building was not the entire usu, we  
th. then perish with the destruction of the subject matter.

(5) plasterings & pavements (tessellated or mosaic etc.)

17. § 3—19. § 4.

3

nus tamen, ut sarta tecta<sup>(1)</sup> habeat: si qua tamen ue-  
tustate corruissent,<sup>(2)</sup> neutrum cogi reficere, sed si heres  
refecerit, passurum fructuarium uti.<sup>(3)</sup> Unde Celsus de  
modo sarta tecta habendi quaerit, si,<sup>(4)</sup> quae uetustate  
corruerunt, reficere non cogitur. Modica igitur refectio  
ad eum pertinet, quoniam et alia onera adgnoscit usu  
fructu legato: ut puta stipendium uel tributum uel  
solarium<sup>1</sup> uel alimenta ab ea re relicta: et ita Mar-  
cellus libro tertio decimo scribit. Cassius quoque  
scribit libro octauo iuris ciuilis fructuarium per arbi-  
trum cogi reficere, quemadmodum adserere cogitur  
arbores: et Aristo notat haec uera esse. Neratius  
autem libro quarto membranarum ait non posse fruc-  
tuarium prohiberi, quo minus reficiat, quia nec arare  
prohiberi potest aut colere: nec solum necessarias  
refectiones facturum, sed etiam uoluptatis causa (ut  
tectoria et pauimenta<sup>(5)</sup> et similia) facere, neque autem  
ampliare nec utile detrudere<sup>(6)</sup> posse, || quamuis melius  
repositurus sit: quae sententia uera est.<sup>(7)</sup>

(4) 'assuming', 'it be-  
admitted'

of 3r. ad-daim.

charged by will or  
thing (i.e. subj-matter  
usufruct)

plant trees (for  
to cling to).

remove, pull down  
8. IDEM ad  
edict. XL.  
even though he would replace it by better

9. IDEM ad  
Sab. XVII.  
4. fr. percurrit per

Item si fundi usus fructus sit legatus, quidquid  
in fundo nascitur, quidquid inde percipi potest, ipsius  
fructus est, sic tamen ut boni uiri arbitratu<sup>(8)</sup> fruatur:  
nam et Celsus libro octauo decimo digestorum scribit  
cogi eum posse recte colere. Et si apes in eo fundo  
sint, earum quoque usus fructus ad eum pertinet.  
Sed si lapidicinas habeat et lapidem caedere uelit  
uel cretifodinas habeat uel harenas, omnibus his usu-  
rum Sabinus ait quasi bonum patrem familias: quam  
sententiam puto ueram. Sed si haec metalla post  
usum fructum legatum sint inuenta, cum totius agri  
relinquatur usus fructus, non partium, continentur  
legato. Huic uicinus tractatus est, qui solet in eo  
quod accessit tractari<sup>(9)</sup> et placuit alluionis quoque  
usum fructum ad fructuarium pertinere. Sed si insula  
iuxta fundum in flumine nata sit, eius usum fructum  
ad fructuarium non pertinere Pegasus scribit, licet

1 'duly, in accordance  
law'.

2 Stone quarries  
sandpits

<sup>1</sup> salarium Codd.

lit. 'salt money': hence any fixed <sup>customary</sup> ~~sum~~

payment; but prob. we shd. read solarium 'ground rent'. 1—2

(8) not nec. actual decision of bonus vir - a gen. standard of care; cf. our 'reasonable  
prudent man'. + see quasi bonum patrem familias in § 2.

(9) 'closely akin to this is the question which is now to arise in regard to accretion'.

change?

Right to  
repair.

Rights of  
fructuary  
in landed  
estate

as regards  
bees,

minerals,  
quarries

access-  
ions,

cedi for the fructuary's benefit? (4) Analogy betw. plant of an estate, & a wood wh. while not a part of the estate proper, has been commonly used to supply it with stake etc.

proprietati accedat: esse enim ueluti proprium fundum<sup>(1)</sup>, cuius usus<sup>1</sup> fructus ad te non pertineat. Quae sententia non est sine ratione: nam, ubi latet<sup>2</sup> incrementum, et usus fructus augetur, ubi autem apparet separatim, fructuario non accedit. Aucupiorum<sup>3</sup> 5 *'fording'* quoque et uenationum redditum Cassius ait libro octauo iuris ciuili ad fructuarium pertinere: ergo et piscationum. Seminarii autem fructum puto ad 6 *'nursery bed'* fructuarium pertinere ita<sup>3</sup>, ut et uendere ei et seminare liceat: debet tamen <sup>plant'</sup>conferendi agri causa seminarium paratum semper renouare quasi instrumentum agri, ut finito usu fructu domino restituatur. In- 7 *'farm plant'* strumenti autem fructum habere debet: uendendi *'power of sale'* tamen facultatem non habet. Nam et si fundi usus fructus fuerit legatus, et sit ager, unde palo in fundum, cuius usus fructus legatus est, solebat pater familias uti, uel salice uel harundine, puto fructuarium hactenus uti posse, ne ex eo uendat, nisi forte salicti ei uel *'willow-plant'* siluae palaris uel harundineti usus fructus sit legatus: tunc enim et uendere potest. Nam et Trebatius scribit siluam caedua et harundinetum posse fructuarium caedere, sicut pater familias <sup>(4)</sup>caedebat, et uendere, licet pater familias non solebat uendere sed ipse uti: ad modum enim referendum est, non ad qualitatem utendi. Ex silua caedua pedamenta et ramos ex arbore usu- 10. POMPONIUS ad Sab. v. fructuarium sumpturum: ex non caedua in uineam sumpturum, dum ne fundum deteriorem faciat.<sup>(7)</sup>

||<sup>1</sup> Sed si grandes arbores essent, non posse eas caedere. || Arboribus <sup>uprooted</sup>euolsis uel ui uentorum deiectis <sup>residence, farm-house</sup>usque ad usum suum et uillae posse usufructuarium <sup>timber</sup>ferre Labeo ait: nec materia eum pro ligno usurum, si <sup>firewood</sup>habeat unde utatur ligno: quam sententiam puto ueram: alioquin et si totus ager sit hunc casum passus, omnes arbores auferret fructuarius: materiam tamen ipsum succidere, quantum ad uillae refectionem, putat posse: *'as much as is required for the repair of the farm-house'*

<sup>1</sup> usu F.

<sup>2</sup> latet ex mea con.; latitet Codd. (quantitatis vlt.)

<sup>3</sup> ita tamen ut Codd.

former owner? (1) for regard is to be had to the amount [taken] not to the kind of use of it. (7) i.e. he may take them from a coppice for any purpose, but from any other wood only for his vines.

> (2), quoted by Bowen L.L. in *Harwood v. Harrison* [1891] 3 C.B. 306, at p. 362.



will only have an estate just above it. A person must not exercise it himself.  
2) Mommsen emends to locavit, i.e. the unauthorized agent does not let but exercises it himself.  
3) i.e. if he does any positive act (e.g. loan) on the basis of my property

## 1 12. § 1—§ 3.

5

just as he may burn lime  
quemadmodum calcem, inquit, coquere uel harenam  
fodere aliudue quid aedificio necessarium sumere.

Usufruct  
in ship.

Nauis usu fructu legato ad<sup>1</sup> nauigandum mittenda<sup>1</sup>  
dam puto, licet naufragii periculum immineat: naus  
etenim ad hoc paratur, ut nauiget.

### What is Exercise of Usufruct?

What is  
exercise of  
usufruct?

Usufructuarius uel ipse frui ea re uel alii fruen- 2  
dam concedere uel locare uel uendere potest: nam et qui  
locat utitur, et qui uendit utitur. Sed et si alii pre- my tenure at will  
cario concedat uel donet, puto eum uti atque ideo .. a disputed point  
retinere usum fructum, et hoc Cassius et Pegasus  
responderunt et Pomponius libro quinto ex Sabino  
probat. Non solum autem si ego locauero, retineo  
usum fructum, sed<sup>2</sup> et si alius negotium meum gerens  
locauerit usum fructum, Iulianus libro trigensimo  
quinto scripsit retinere me usum fructum. Quid ta-  
men si non locauero,<sup>2)</sup> sed absente et ignorante me  
negotium meum gerens utatur quis et fruatur? nihilo  
minus retineo usum fructum (quod et Pomponius libro  
quinto probat) per hoc, quod negotiorum gestorum  
actionem adquisiui. i.e. he is accountable to me for the profits.

Usufruct  
of fugitive  
slave.

De illo Pomponius dubitat, si fugitiuus, in quo 3  
meus usus fructus est, stipuletur aliquid ex re mea uel<sup>3)</sup> or takes delivery  
per traditionem accipiat, an per hoc ipsum, quasi utar, tradition [on my part]  
retineam usum fructum? magisque admittit retinere.  
Nam saepe etiamsi praesentibus seruis non utamur,  
tamen usum fructum retinemus: ut puta aegrotante<sup>3</sup>  
seruo uel infante, cuius operae nullae sunt, uel defectae  
senectutis homine: nam et si agrum aremus, licet tam  
sterilis sit, ut nullus fructus nascatur, retinemus usum  
fructum. Iulianus tamen libro trigensimo quinto di-  
gestorum scribit, etiamsi non stipuletur quid seruus  
fugitiuus, retineri tamen usum fructum: nam qua  
ratione, inquit, retinetur a proprietario possessio,

<sup>1</sup> Codd. omittunt ad.

<sup>2</sup> sed Momms. cum Gracis; seu F.

<sup>3</sup> aegrotanti seruo uel infanti F; aegrotante seruo infante Uat.

under 7 yrs.  
of fresh law.

on the same principle has

...in the interest of the owner, the usufructuary is not liable for the loss of the thing, if it is lost through no fault of his. (the usufructuary) are always vested in someone else, & ∴ it is not lost as long as the slave nothing (such as bargaining w. the usufructuary's property) for the benefit of the usufructuary.

6

1 12. § 4—§ 5.

etiamsi in fuga seruus sit, pari ratione etiam usus fructus retinetur. Idem tractat: quid, si quis pos- 4 sessionem eius nactus sit? an, quemadmodum a pro- just as prietario possideri desinit, ita etiam usus fructus amittatur? et primo quidem ait posse dici amitti usum fructum, sed licet amittatur, tamen dicendum, quod intra constitutum tempus ex re fructuarii stipulatus est, fructuario adquiri<sup>1</sup>: per quod colligi posse dici, ne quidem si possideatur ab alio, amitti usum fructum, si modo mihi aliquid stipuletur, paruique it is of small account referre, ab herede possideatur uel ab alio, cui hereditas uendita sit uel cui proprietates legata sit, an a prae- done: <sup>2</sup> sufficere enim ad retinendum usum fructum esse affectum retinere uolentis et seruum nomine fructuarii aliquid facere: quae sententia habet rationem.

Ripe produce before gathering.

Julianus libro trigensimo quinto digestorum trac- 5 tat, si fur <sup>stole</sup> decerpserit uel <sup>cut</sup> desecerit fructus maturos pendentes, cui conditione teneatur<sup>2</sup>, domino fundi an fructuario? et putat, quoniam fructus non fiunt fructuarii, nisi ab eo percipiantur, licet ab alio terra separentur, magis proprietario conditionem competere, fructuario autem furti actionem, quoniam interfuit eius fructus non esse ablatos. Marcellus autem <sup>sees & covers</sup> mouetur eo, quod, si postea fructus istos nactus fuerit fructuarius, fortassis fiant eius: nam si fiunt, qua ratione hoc euenit? nisi ea, ut interim fierent proprietarii, mox adprehensi fructuarii efficiantur<sup>2</sup>, exemplo rei sub con- on the analogy of ditione legatae, quae interim heredis est, existente autem conditione ad legatarium transit; uerum est enim conditionem competere proprietario. Cum autem in pendenti est dominium, ut ipse Iulianus ait in<sup>3</sup> fetu 4. § 25. 1 qui summittitur et in eo quod seruus fructuarius per traditionem accepit nondum quidem pretio soluto, sed tamen ab eo satisfact<sup>3</sup>, dicendum est conditionem pendere<sup>4</sup>.

<sup>1</sup> adquiri potest Codd.

<sup>2</sup> efficiuntur F.

<sup>3</sup> inque fetu F, ex incerta manu.

<sup>4</sup> Addunt Codd. magisque in pendenti esse dominium.

whom is he liable by conditio? cf. note p. 93

sufficiently guaranteed by him' (i.e. to the vendor's satisfaction) - a non-technical term that has a wider significance than satisfactio

is necessary.  
(2) when an action is brought on the u. i.e. by the reversioner, the judge may lay down rules as to the fructuary's future conduct.

## What is due Exercise of Usufruct?

Fructuary must give security. Si cuius rei usus fructus legatus erit, dominus potest in ea re satisfactionem desiderare, ut officio iudicis hoc fiat: <sup>(1)</sup> nam sicuti debet fructuarius uti frui, ita et proprietatis dominus securus esse debet de proprietate. Haec autem ad omnem usum fructum pertinere Iulianus libro trigensimo octauo digestorum probat: si usus fructus legatus sit, non prius dandam actionem usufructuario, quam satisdederit se boni uiri arbitrato usurum fruiturum. Sed et si plures sint, a quibus usus fructus relictus est, singulis satisfacere oportet. Cum igitur de usu fructu agitur, <sup>2</sup> non solum quod factum est arbitratur, sed etiam in futurum quemadmodum uti frui debet. De praeteritis autem <sup>2</sup> damnis fructuarius etiam lege Aquilia tenetur et interdicto 'quod ui aut clam,' ut Iulianus ait: nam fructuarium quoque teneri his actionibus nec non furti certum est, sicut quemlibet alium, qui in aliena re tale quid commiserit. Denique consultus, quo bonum fuit actionem polliceri praetorem, cum competat legis Aquiliae actio, respondit, quia sunt casus, quibus cessat Aquiliae actio, ideo iudicem dari, ut eius arbitrato utatur: nam qui agrum non <sup>break up, plough</sup> proscindit, qui uites non subserit, item aquarum ductus corrumpi patitur, lege Aquilia non tenetur. Eadem et in usuario dicenda sunt. Sed si inter duos fructuarios sit controuersia, <sup>3</sup> Iulianus libro trigensimo octauo digestorum scribit aequissimum esse quasi communi diuidendo iudicium dari uel stipulatione inter se eos cauere, qualiter fruantur: cur enim, inquit Iulianus, ad arma et rixam procedere patiatur praetor, quos potest iurisdictione sua componere? quam sententiam Celsus quoque libro uicensimo digestorum probat, et ego puto ueram.

Fructuarius <sup>condition</sup> causam proprietatis deteriorem facere <sup>4</sup> non debet, meliorem facere potest. Et aut <sup>(4)</sup> fundi est usus fructus legatus, et non debet neque arbores frugiferas excidere <sup>(5)</sup> neque uillam diruere <sup>(6)</sup> nec quicquam facere

13. IDEM  
ad Sab.  
XVIII.

i.e. no matter how contributed.

i.e. in proportion respective shares

he is liable under

+ even the action.  
(i.e. if he takes things are not fruits)

renew (plant new) to replace those destroyed  
holders of a mere usufruct

'a local analogy for partitioning common property'

appeal, settle

Restrictions on fructuary in landed estates,

(3) 'then the jurist (note consultus!) [in reply to the question] what was the use of the praetor's - promising an action since an action [already] lies under the l. Aquilia? replies that the latter statute only applied to actual injury, not to negligence (usually) nor failure to perform a duty'

(4) a number of alternative examples given, e.g. arbores (7), diruere (8) etc.



in perniciem proprietatis: et si forte uoluptarium fuit  
 praedium, uirdiaria uel gestationes uel deambulationes<sup>(1)</sup>  
 arboribus infructuosis opacas atque amoenas habens,  
 non debet deicere, ut forte hortos olitorios faciat uel<sup>(2)</sup> *vegetable garden*  
 aliud quid, quod ad reditum spectat. Inde est quae-  
 situm, an lapidicinas uel cretifodinas uel harenifodinas<sup>cf. Fr. 29 § 2.</sup>  
 ipse instituere possit: et ego puto etiam ipsum instituere  
 posse, si non agri partem necessariam huic rei occupa-  
 turus est.<sup>(3)</sup> *Proinde* uenas quoque lapidicinarum et  
 huiusmodi metallorum inquirere poterit: ergo et auri  
 et argenti et sulphuris<sup>copied</sup> et ferri et ceterorum fodinas  
 et quas pater familias instituit exercere poterit uel ipse<sup>'work'</sup>  
 instituere, si nihil agriculturae nocebit: et si forte in  
 hoc quod instituit plus reditus sit quam in uineis uel  
 arbustis uel oliuetis quae fuerunt, forsitan etiam haec  
 deicere poterit, si quidem ei permittitur meliorare<sup>= since</sup>  
 proprietatem. Si tamen quae instituit usufructuarius<sup>6</sup>  
 aut caelum corrumpant agri aut magnum apparatus<sup>equipment</sup>  
 sint desideratura<sup>artisans</sup> opificum forte uel legulorum,<sup>(4)</sup> quae non  
 potest sustinere proprietarius, non uidebitur uiri boni  
 arbitrato frui: sed nec aedificium quidem positurum in  
 fundo, nisi quod ad fructum percipiendum necessarium  
 sit. Sed si aedium usus fructus legatus sit, Nerua<sup>7</sup>  
 filius et lumina immittere eum posse ait: sed et colores<sup>staining colours</sup>  
 et picturas et marmora poterit et sigilla et si quid ad  
 domus ornatum: sed neque diaetas transformare uel  
 coniungere aut separare ei permittetur, uel aditus post-  
 casue uertere, uel refugia aperire, uel atrium mutare, uel  
 uirdiaria ad alium modum conuertere: excolere enim<sup>improvement</sup>  
 quod inuenit potest qualitate aedium non immutata.  
 Item Nerua eum cui aedium usus fructus legatus sit  
 altius tollere non posse, quamuis lumina non obscurantur,  
 quia tectum magis turbatur: quod Labeo etiam in pro-  
 prietatis domino scribit.<sup>(6)</sup> Idem Nerua nec obstruere eum  
 posse.<sup>(7)</sup> Item si domus usus fructus legatus sit, 8  
meritoria illic facere fructuarius non debet nec per  
cenacula diuidere domum: atquin locare potest, sed  
 oportebit quasi domum locare. Nec balneum ibi<sup>'public bath'</sup>  
 'even the existing lights be not darkened' Henry - 'where? In the neighbouring house? In  
 own house?' (6) 'which d. writes applies also to the owner of the reversion' i.e. cannot raise  
 house; cf. Fr. 7 § 1. 'he inuicta'.

is it a slang expression  
next note (3) 'reverted for beakets & carriage', (4) 'he may claim the ownership (however of the things as are plainly detached.'

faciendum est. Quod autem dicit meritoria non factu-  
rum, ita accipe, quae uolgo deuersoria uel fullonica<sup>(1)</sup> take it & apply  
appellant. Ego quidem, et si balineum sit in domo  
usibus dominicis solitum uacare<sup>(2)</sup> in intima parte domus  
uel inter diaetas amoenas, non recte nec ex boni uiri  
arbitratu facturum, si id locare coeperit, ut publice  
lauet, non magis quam si domum ad stationem<sup>(3)</sup> iumen-  
torum locauerit, aut si, stabulum quod erat domus, <sup>stabling</sup>  
iumentis et carruchis uacans, <sup>(3) taking</sup> pistrino locauerit, || licet  
<sup>Stabulum?</sup> multo minus ex ea re fructuum<sup>1</sup> percipiat. || Sed si  
<sup>'build on'</sup> quid inaedificauerit, postea eum neque tollere hoc  
<sup>detach</sup> neque refigere posse: refixa plane posse uindicare.  
<sup>in slaves,</sup> Mancipiorum quoque usu fructu<sup>2</sup> legato non debet  
<sup>to farm more</sup> abuti, sed secundum condicionem eorum uti: nam si  
librarium rus mittat et qualum <sup>light</sup> et calcem portare cogat,  
<sup>either</sup> histrionem balneatorem<sup>3</sup> faciat, uel de symphonia atri-  
<sup>athlete</sup> ensem, uel de palaestra stercorandis latrinis praeponat,  
<sup>number of the chorus</sup> abuti uidebitur proprietate. Sufficiens autem alere<sup>2</sup>  
et uestire debet secundum ordinem et dignitatem man-  
cipiorum. Et generaliter Labeo ait in omnibus rebus  
<sup>to farm more</sup> mobilibus modum eum tenere debere, ne sua feritate uel  
<sup>destruction</sup> saeuitia ea corrumpat: alioquin etiam lege Aquilia eum  
conueniri. Et, si uestimentorum usus fructus<sup>4</sup>  
legatus sit, non sic ut quantitatis usus fructus legetur,  
dicendum est ita uti eum debere, ne abutatur: nec  
tamen locaturum, quia uir bonus ita non uteretur.  
Proinde et si scaenicae uestis usus fructus legetur<sup>5</sup>  
uel aulaei uel alterius apparatus, alibi quam in scaena  
non utetur. Sed an et locare possit, uidendum est: et  
puto locaturum, et licet testator commodare, non locare,  
fuerit solitus, tamen ipsum fructuarium locaturum tam  
scaenicam quam funebrem uestem<sup>4</sup>. <sup>mourning apparel</sup> pompas funebres  
Proprietatis dominus non debet impedire fruc-  
tuarium ita utentem, ne deteriore <sup>(6)</sup> eius condicionem  
faciat. De quibusdam plane dubitatur, si eum uti

<sup>1</sup> Ita Hal.; fructum Codd.

<sup>2</sup> Ita dett. Codd.; usus fructus F.

<sup>3</sup> balniatorem Codd. Momms.

<sup>4</sup> Post uestem ins. F ex incerta manu si lanae alicui.

(5) i.e. 'not in the sense that the usufr. of a number [of dresses] is bequeathed', but rather of certain dresses. The former case wd. be a quasi-ult. (6) Frensch. is doubtful: to whom does eius refer?

(A) to proprietor, or (B) usufructuary?

series of commentaries which are of great value, in which the <sup>1</sup> *pro* *class* *frames* *to* *proving* *houses* *etc.* (2) i.e. Ulpian holds that the plant is included in the estate or house. (4) i.e. as he is unable to prevent the acquisition of a servitude by *minus* he is equally unable to acquire one for him.

10

l 15. § 7—l 17.

imposition of new servitudes,

devotion of land to religion,

powers over slaves.

merely, e.g. to of the fructuary.

legally 'detracting' (fact it does)

on the ufr. (i.e. by using)

prohibeat, an iure id faciat: ut puta doleis, si forte fundi usus fructus sit legatus, et putant quidam, etsi defossa sint, uti prohibendum: idem et in seriis et in cuppis et in cadis et amphoris putant: idem et in specularibus, (2) si domus usus fructus legetur: sed ego puto, nisi sit contraria uoluntas, etiam instrumentum fundi uel domus contineri. (3)

Sed nec seruitutem imponere fundo 7 potest proprietarius nec amittere seruitutem: adquirere plane seruitutem eum posse etiam inuito fructuario Iulianus scripsit. Quibus consequenter (4) fructuarius quidem adquirere fundo seruitutem non potest, retinere autem potest: et si forte fuerint non utente fructuario amissae, hoc quoque nomine tenebitur. Proprietatis dominus ne quidem consentiente fructuario seruitutem imponere potest, || nisi per<sup>1</sup> quam deterior fructuarii condicio non fiat, ueluti si talem seruitutem uicino concesserit ius sibi non esse altius tollere. (5)

Locum autem religiosum facere potest consentiente usufructuario: et hoc uerum est fauore religionis. Sed interdum et solus proprietatis dominus locum religiosum facere potest: finge enim eum testatorem inferre, cum non esset tam oportune ubi sepeliretur. (6)

Ex eo, ne deteriorem condicionem fructuarii faciat proprietarius, solet quaeri, an seruus dominus coercere possit: et Aristo apud Cassium notat plenissimam eum coercitionem habere, si modo sine dolo malo faciat: quamuis usufructuarius nec contrariis quidem ministeriis aut inusitatis artificium eius corrumpere possit nec seruus cicatricibus deformare. Proprietarius autem et seruus 2 noxae dedere poterit, si hoc sine dolo malo faciat, quoniam noxae deditio iure non peremit usum fructum, non magis quam usucapio proprietatis, quae post constitutum usum fructum contingit. (8)

Debet plane denegari usus fructus persecutio, si ei qui noxae accipit litis aestimatio<sup>9</sup> non offeratur a fructuario. Si quis 3 seruus occiderit, utilem actionem exemplo Aquiliae fructuario dandam numquam dubitauit.

<sup>1</sup> per om. F; ins. alii Codd. et edd.

The fructuary's consent cannot authorise the dominus to create a new servitude except one which would make his position worse. There is much difference of opinion as to the reason for this. (6) Since there was no other place where he could be as suitably buried. (7) by [making him] undertake unfamiliar duties. i.e. the ufr.'s powers are limited to this extent. (8) i.e. if the slave subsequently acquires the estate, the owner has no remedy, no parallel is

catches builds turn

but

hurried

tubs

(2)

(4)

16. PAULUS ad Sab. III.

17. ULPIANUS ad Sab. XVIII.

bury

1 arising out of the rule that

i.e. the valuation 'deditio' i.e. the damages which are payable as an alternative to surrender.



w. acquire an obligation for the fructuary (3) or whether possession has been handed over to him, (4) Slave ed. on  
 by delivery w. w. convey property + enable the fructuary to a real action. (5) Slave ed. on  
 take up inheritance or accept legacy for someone else usually held that fructuary's interest  
 in slave was not sufficient to allow of his taking either third him.

# Miscellaneous Extracts.

Trees decayed, not blown down & § 9 § 1. Agri usu fructu legato in locum demortuarum arborum aliae substituendae sunt, et priores ad fructu- 18. PAUL-  
 arium pertinent. *stock of building*

Imposi- tion of servitudes. Proculus putat insulam<sup>1</sup> posse ita legari, ut ei seruitus imponatur quae alteri insulae hereditariae debeatur, hoc modo: 'Si ille heredi meo promiserit per se non fore, quo altius ea aedificia tollantur, tum ei eorum aedificiorum usum fructum do lego;' uel sic: 'Aedium illarum, quoad altius, quam uti nunc sunt, aedificatae non erunt, illi usum fructum do lego.' 19. POMP-  
 ONIUS ad Sab. v. % So & So

Trees blown down. Si arbores uento deiectas dominus non tollat, 1 remove  
 per quod incommodior sit<sup>2</sup> usus fructus uel iter, suis actionibus usufructuario cum eo experiundum. *the fr. will have to fight the m. to get him through his proper*

Yearly fruits. Si quis ita legauerit: 'fructus annuos fundi Cornelianus Gaio Maeuio do lego,' perinde accipi debet hic sermo ac si usus fructus fundi esset legatus. 20. ULPI-  
 ANUS ad Sab. XVIII. *language*

## Gains of Owner and Fructuary through Slaves. *(Slaves frequently used agents & managers.)*

Gains through slaves. Si serui usus fructus sit legatus, quidquid is ex opera sua acquirit uel ex re fructuarii, ad eum pertinet, siue stipuletur siue ei possessio fuerit tradita. Si uero heres institutus sit uel legatum acceperit, Labeo distinguunt, cuius gratia uel heres instituitur uel legatum acceperit. Sed et si quid donetur seruo, in quo usus fructus alterius est, quaeritur, quid fieri oporteat. Et in omnibus istis, si quidem contemplatione fructuarii aliquid ei relictum uel donatum est, ipsi adquiret: sin uero proprietarii, proprietario: si ipsius serui, adquiretur domino, nec distinguimus, unde cognitum eum et cuius merito habuit<sup>(5)</sup> qui donauit uel reliquit. Sed et si condicionis implendae causa quid seruus fructuarius consequatur et constiterit<sup>3</sup> contemplatione fructuarii *acquired* 21. IDEM  
 ad Sab. *sc. fruct. XVII.* 22. IDEM  
 ad Sab. XVIII. *in consideration*

<sup>1</sup> Fortasse insulae usum fructum. Vide adnotationem.

<sup>2</sup> incommodior is sit F, Mommsen; om. is Codd. dett.

<sup>3</sup> et addit F ex incerta manu.

(5) 'whence & by whose merit (i.e. whether of the owner's or the fructuary's) he (the testator or donor) has got to know him!'

... defense v. anyone suing in spite of it. 2) if he have obtained a release, he acquires  
[the obligation] for him (i.e. the fructuary). 3) provided he has the wish that pignus  
ade to the fructuary.

12

1 23—1 25. § 1.

<sup>incentu</sup>  
eam condicionem adscriptam, dicendum est ipsi adquiri: sc. usufructuario  
nam et in mortis causa donatione idem dicendum est.

*again*  
Sed sicuti stipulando fructuario acquirit, ita etiam **23. IDEM**  
paciscendo eum adquirere exceptionem<sup>1</sup> fructuario eod. XVII.  
Iulianus libro trigensimo digestorum scribit. Idemque *i.e. Julian*  
et si acceptum rogauerit, liberationem ei p̄rere. 2)

Power of  
fructuary  
over slave.

Quoniam autem diximus quod ex operis acquiritur 1  
ad fructuarium pertinere, sciendum est etiam cogendum  
eum operari: etenim modicam quoque castigationem *15 § 3, 17 § 1.*  
fructuario competere Sabinus respondit et Cassius libro  
octauo iuris ciuilis scripsit, ut<sup>1</sup> neque <sup>torqueat</sup> torqueat, neque  
flagellis caedat.

Gift to  
fructuary  
through  
slave.

Si quis donaturus usufructuario spoponderit seruo **24. PAUL-**  
in quem usum fructum habet stipulanti, ipsi usufruc- **US ad Sab.**  
tuario obligabitur, quia ut ei seruus talis stipulari **X.**  
possit, usitatum est. Sed et si quid stipuletur sibi **25. ULP-**  
aut Sticho seruo fructuario donandi causa, dum uult **ANUS ad**  
fructuario praestitum<sup>3</sup>, dicendum, si ei soluatur, fruc- **Sab. XVIII.**  
tuarium adquiri. *if it is paid to him the slave*

Doubtful  
for whom  
slave  
acquires.

55

Interdum tamen in pendenti est, cui adquirat iste 1  
fructuarius seruus: ut puta si seruus emit et per  
traditionem accepit necdum pretium numerauit, sed  
tantummodo pro eo fecit satis, interim cuius sit, quae-  
ritur: et Iulianus libro trigensimo quinto digestorum  
scripsit in pendenti esse dominium eius et numeratio-  
nem pretii declaraturam, cuius sit: nam si ex re fruc-  
tuarii, retro fructuarii fuisse. Idemque est et si forte *the same appl. also*  
stipulatus sit seruus numeraturus pecuniam: nam  
numeratio declarabit, cui sit adquisita stipulatio. Ergo  
ostendimus in pendenti esse dominium, donec pretium  
numeretur: quid ergo, si amisso usu fructu tunc pre-  
tium numeretur? Iulianus quidem libro trigensimo  
quinto digestorum scripsit adhuc interesse, unde sit  
pretium numeratum: Marcellus uero et Mauricianus *unless some the price that has been paid*  
amisso usu fructu iam putant dominium adquisitionem  
proprietatis domino: sed Iuliani sententia humanior

et responsibly

the point still is

<sup>1</sup> Ita Mommsen cum Codd.; et Uat.; ui F.

if the slave has negotiated a loan & is to repay the amount (lit. to 'count out')

of the estate of each person involved.<sup>(3)</sup> They are a matter for a condition; i.e. cannot claim the specific coins (by vindication) but in on. see for their value. (4) He has effected nothing for the receiver i.e. the transaction has no legal validity.

offered by as the  
the price

the price will be

contrast w. other

est. Quod si ex re utriusque pretium fuerit solutum, ad utrumque dominium pertinere Iulianus scripsit, scilicet pro rata pretii soluti.<sup>(1)</sup> Quid tamen si forte simul soluerit ex re utriusque,<sup>(2)</sup> ut puta decem milia pretii nomine debebat et dena soluit ex re singulorum: cui magis seruus adquirat? Si numeratione soluat, intererit, cuius priores nummos soluat: nam quos postea soluerit, aut uindicabit aut, si fuerint nummi consumpti, ad conditionem pertinent:<sup>(3)</sup> si uero simul in sacculo soluit, nihil fecit accipientis,<sup>(4)</sup> et ideo nondum adquisisse cuiquam dominium uidetur, quia cum plus pretium soluit seruus, non faciet nummos accipientis.

Heruspian

Apportion-  
ment of  
slave's  
hire.

Si operas suas iste seruus locauerit et in annos singulos <sup>a fixed sum</sup> certum aliquid stipuletur, eorum quidem annorum stipulatio, quibus usus fructus mansit, adquiretur fructuario, sequentium uero stipulatio ad proprietarium transit semel adquisita fructuario, quamuis non soleat stipulatio semel cui quaesita ad alium transire nisi ad heredem uel adrogatorem. Proinde si forte usus fructus in annos singulos fuerit legatus et iste seruus operas suas locauit et stipulatus est ut supra scriptum est, prout capitis minutione amissus fuerit usus fructus, mox restitutus,<sup>(5)</sup> ambulabit stipulatio perfecta ad heredem redibit ad fructuarium. Quaes-

2 of Fr. 26

= rt. to sure

when once acqui-  
by one person  
i.e. not assignat  
exc. by novat

according to  
will shift

Owner has  
residuary  
rights.

tionis est, an id quod adquiri fructuario non potest proprietario adquiratur. Et Iulianus quidem libro trigensimo quinto digestorum scripsit, quod fructuario adquiri non potest, proprietario quaeri. Denique scribit eum, qui ex re fructuarii stipuletur nominatim proprietario uel iussu eius, ipsi adquirere. Contra autem nihil agit, si non ex re fructuarii nec ex operis suis fructuario stipuletur.<sup>6</sup>

c. proprietario

expressly for

Seruus fructuarius si usum fructum in se dari stipuletur aut sine nomine aut nominatim proprietario, ipsi acquirit exemplo serui communis, qui stipulando rem alteri ex dominis cuius res est, nihil agit, quoniam rem suam stipulando quis nihil agit, alteri stipulando acquirit solidum. Idem Iulianus eodem libro scripsit: si seruo fructuarius operas eius

4? from whom  
stipulate this?

Slave can-  
not hire  
his own  
services.

5 the whole am

(5) the other two acc. as the subject may have been lost by cap. man but afterwards recovered

(6) the remainder has residuary power over slave & rights where limited power & rights of the fructuary are not concerned. These rts. cannot be ousted by the mere command of the fr.

(7) if he stipulate for a thing already belonging to 1 of them in favour of the other, no legal effect; but if in favour of the other, the latter acquires the whole thing



*a freed rent & then being free to retain the profit of his art over that amt. as a peculium*  
*the slave's services in this way*  
*it is clear that the second point <sup>fructuarius</sup> gets nothing: balance goes to the reverent.*

*to me, the master.*

locauerit, nihil agit: nam et si ex re mea, inquit, a me stipulatus sit, nihil agit, non magis quam seruus alienus bona fide mihi seruiens idem agendo domino quicquam adquiret. Simili modo, ait, ne quidem si rem meam a me, fructuario, conducat, me non obligabit. Et regulariter definiit: quod quis ab alio stipulando mihi adquiret, id a me stipulando nihil agit: nisi forte, inquit, nominatim domino suo stipuletur a me uel conducat.

*Case of two fructuaries.*

Si duos fructuarios proponas et ex alterius re seruus sit stipulatus, quaeritur, utrum totum an pro parte, qua habet usum fructum, ei quaeratur.<sup>2</sup> Nam et in duobus bonae fidei possessoribus hoc idem est apud Scaeuolam agitatum libro secundo quaestionum, et ait uolgo creditum rationemque hoc facere,<sup>3</sup> ut, si ex re alterius stipuletur, partem ei dumtaxat quaeri, partem domino: quod si nominatim sit stipulatus, nec dubitari debere, quin adiecto nomine solidum ei quaeratur. Idemque ait et si iussu eius stipuletur, quoniam iussum pro nomine accipimus. Idem et in fructuariis erit dicendum, ut, quo casu non totum adquiretur fructuario, proprietatis domino erit quaesitum, quoniam ex re fructuarii quaeri ei posse ostendimus.

*6 'causare'*

*i.e. the fructuarius who owns the thing*

*i.e. § 3 on 1st page.*

*Rules apply to all fructuaries.*

Quod autem diximus ex re fructuarii uel ex operis posse adquirere, utrum tunc locum habeat, quod iure legati usus fructus sit constitutus, an et si per traditionem uel stipulationem uel alium quemcumque modum, uidendum. Et uera est Pegasi sententia, quam et Iulianus libro sexto decimo secutus est, omni<sup>1</sup> fructuario adquiri.

*7 i.e. in l. 21*

*by kind of*

*Remainder of hire vests in owner.*

Si operas suas locauerit seruus fructuarius et imperfecto tempore locationis usus fructus interierit, quod superest ad proprietarium pertinebit. Sed et si ab initio certam summam propter operas certas stipulatus fuerit, capite deminuto eo idem dicendum est.

**26. PAULUS** ad Sab. III.

*ump sum'*

<sup>1</sup> Ita Mommsen ex con. Cuiacii. Codd. omnia.

*but both popular belief & logic conduce to this'*

either by using them for purposes of...  
 3 'unskilled' lit. empty: (4) 'what is contributed out of the produce  
 on account of the passage of troops' - sometimes commuted for money  
 5) have used in non-technical sense (cf. English!) for 'landowners' as opposed to  
negotiabores.  
 1 27—1 29. 15

## Rights and Liabilities of Fructuary further considered.

Fructuary's right to hanging produce, to let shops, to train slaves.  
 Si pendentes fructus iam maturos reliquisset testator, fructuarius eos feret, si die legati cedente<sup>has found</sup> adhuc pendentes deprehendisset: nam et stantes fructus ad fructuarium pertinent. Si dominus solitus fuit tabernis ad merces suas uti uel ad negotiationem, utique<sup>was</sup> permittetur fructuario locare eas et ad alias merces, et illud solum observandum, ne uel abutatur usufructuarius uel contumeliose iniurioseue utatur usu fructu. Si serui usus fructus legatus est, cuius testator quasi ministerio uacuo<sup>profession</sup> utebatur, si eum disciplinis uel arte instituerit usufructuarius, arte eius uel peritia utetur. 27. ULP-ANUS ad Sab. xviii.

Fructuary's liability to pay taxes, &c. way-rate, and over, to submit to existing servitudes and restrictions.  
 Si quid cloacarum nomine debeatur uel si quid ob formam aquae ductus, quae per agrum transit, pendatur, ad onus fructuarii pertinebit: sed et si quid ad collationem uiae, puto hoc quoque fructuarium subiturum: ergo et quod ob transitum exercitus confertur ex fructibus: sed et si quid municipio: nam solent possessores certam partem fructuum municipio uiliori pretio addicere; solent et fisco fusiones praestare. Haec onera ad fructuarium pertinebunt. Si qua seruitus imposita est fundo, necesse habebit fructuarius sustinere: unde et si per stipulationem seruitus debeatur, idem puto dicendum. Sed et si seruus sub poena emptus sit interdictis certis quibusdam, an, si usus fructus eius fuerit legatus, observare haec fructuarius debeat? et puto debere eum observare: alioquin non boni uiri arbitrato utitur et fruitur. 3 probably for the channel. r. functions

## Miscellaneous Extracts.

Usufruct in coins,  
 Nomismatum aureorum uel argenteorum ueterum, quibus pro gemmis uti solent, usus fructus legari potest. 28. POM-ONUS ad Sab. v.

in whole estate.  
 Omnium bonorum usum<sup>1</sup> fructum posse legari, nisi excedat dodrantis aestimationem, Celsus libro tri- 29. ULP-ANUS ad Sab. xv.

<sup>1</sup> usu F.

(b) prob. means 'if the proprietor had previously bound himself by stipulation to create servitude. (7) under certain conditions imposed by the purchaser, the loan of coin. involved a 'penalty', i.e. that he shd. not be manumitted. (8) Ulp. cd. not to be created in ordinary money but ancient coins no longer current can be given in usufr. (9) i.e. 'Falcidian Fourth' must be reserved to the heir. But how estimate the usufr. when

or whatever savings the slave has made fr. the maintenance of his personal necessities. This property, e.g. profits on transactions, or savings on money given him for personal expenses. This means that the slave's pemium is included: altho' in one sense it belongs to himself, yet legally was the fructuary's & might be taken in satisfaction of the latter's debt.

gensimo secundo digestorum et Iulianus libro sexagen-  
simo primo scribit : et est uerius.

Powers of owner.

Si is qui binas aedes habeat aliarum usum fructum legauerit, posse heredem Marcellus scribit alteras altius tollendo <sup>imposed on the</sup> officere<sup>1</sup> luminibus, quoniam habitari potest etiam obscuratis aedibus. Quod usque adeo temperandum est, ut non in totum aedes obscrentur, sed modicum lumen, quod habitantibus sufficit, habeant.

30. PAULUS ad Sab. III.

What is ex re fructuarii?

Ex re fructuarii etiam id intellegitur, quod ei fructuarius donauerit concesseritue uel ex administratione rerum eius compendii seruus fecerit.<sup>1)</sup>

31. IDEM ad Sab. X.

Reservation by owner.

Si quis unas aedes, quas solas habet, uel fundum tradit, excipere potest id quod personae, non praedii, est, ueluti usum et usum fructum: sed et si excipiat, ut pascere sibi uel inhabitare liceat, ualet exceptio, cum ex multis saltibus pastione fructus perciperetur; et habitationis exceptione, siue temporali siue usque ad mortem eius qui exceptit, usus uidetur exceptus.<sup>2)</sup>

32. POMPONIUS ad Sab. XXXIII.

Usufruct follows ownership,

Si Titio fructus, Maeuio proprietas legata sit et uiuo testatore Titius decedat, nihil apud scriptum heredem relinquetur: et id Neratius quoque respondit.

33. PAPIANUS Quaest. XVII.

but is not a part.

Usus fructus in quibusdam casibus non partis effectum optinere conuenit: unde si fundi uel fructus portio petatur et absolutione secuta postea pars altera quae adcreuit uindicetur, in lite quidem proprietatis iudicatae rei exceptionem ob stare, in fructus uero non ob stare scribit Iulianus, quoniam portio fundi uelut alluuiio portioni, personae fructus adcre sceret.

[cite]

the former part<sup>1</sup>

Joint and separate usufruct.

Quotiens duobus usus fructus legatur ita, ut alternis annis utantur fruantur, si quidem ita legatus fuerit 'Titio et Maeuio,' potest dici priori Titio, deinde Maeuio legatum datum. Si uero duo eiusdem nominis fuerint et ita scriptum fuerit 'Titiis usus fructum alternis annis do:.' nisi consenserint, uter eorum prior utatur, inuicem sibi impedimento erunt<sup>2</sup>. Quod si Titius eo anno, quo frueretur, proprietatem accepisset, interim

34. IULIANUS Dig. XXXV.

don't 2

<sup>1</sup> Ita ex mea con. ; obscurare Codd.  
<sup>2</sup> Ita ex mea con. ; sibi impediunt Codd.

i.e. a rt. of pasture is a sub-species of usufructus just as habitatio is of usus.  
Both reuerisn & ufr. are given in legacy (their taking neither).  
that ufr. has not the legal effect of a part (of ownership)

4) In certain cases it is



legatum non habebit, sed ad Maeuium alternis annis usus fructus pertinebit: et, si Titius proprietatem alienasset, habebit eum usum fructum; quia et si sub conditione usus fructus mihi legatus fuerit et interim proprietatem ab herede accepero, pendente autem conditione eandem alienauero, ad legatum admittar.

*Usufruct bequeathed to tenant.*

Si colono tuo usum fructum fundi legaueris, usum 1 fructum uindicabit et cum herede tuo agat ex conducto et consequetur, ut neque mercedes praestet et impensas, quas in culturam fecerat, recipiat<sup>1</sup>.

*Usufruct lost by change of object.*

Uniuersorum bonorum an singularum rerum usus 2 fructus legetur, hactenus interesse puto, quod, si aedes incensae fuerint, usus fructus specialiter aedium legatus peti non potest, bonorum autem usu fructu legato areae usus fructus peti poterit: quoniam qui bonorum suorum usum fructum legat, non solum eorum quae in specie sunt, sed et substantiae omnis, usum fructum legare uidetur: in substantia autem bonorum etiam area est.

*Heir's delay.*

Si usus fructus legatus est, sed heres scriptus ob 35. IDEM <sup>ad Ur-</sup> hoc tardius adit, ut tardius ad legatum perueniretur, <sup>seium</sup> hoc quoque praestabitur, ut Sabino placuit. <sup>Peroc, l.</sup> *this (i.e. the loss resulting fr. his d.) shall also be reme-*

*Slave's freedom and sale of usufruct.*

Usus fructus serui mihi legatus est, isque, cum 1 ego uti frui desissem, liber esse iussus est: deinde ego ab herede aestimationem legati tuli: nihilo magis eum liberum fore Sabinus respondit, (namque uideri me uti frui homine, pro quo aliquam rem habeam), condicionem autem eius libertatis eandem manere, ita ut mortis meae aut capitis deminutionis <sup>occurrence</sup> interuentu liber futurus esset.

*Change of object.*

Qui usum fructum areae legauerat, insulam ibi 36. AFR- aedificauit: ea uiuo eo decidit uel <sup>break down</sup> deusta est: usum <sup>ICANUS</sup> fructum deberi existimauit: contra autem non idem <sup>Quaest. v.</sup> iuris esse, si insulae usu fructu legato area, deinde <sup>broken</sup> insula, facta sit: idemque esse, et si scyphorum usus fructus legatus sit, deinde massa facta et iterum scyphi: <sup>original character</sup> licet enim pristina qualitas scyphorum restituta sit, non tamen illos esse, quorum usus fructus legatus sit.

<sup>1</sup> Post recipiat addit F ex incerta manu constitutum.

R.

(a) i.e. if for any reason (e.g. escape). he cannot hand over <sup>2</sup> the slave, or if (2 doubtful) he does not wish to hand him over, + chooses to pay compensation (v. high)  
(b) these bowls were sometimes made of silver

Reserva-  
tion of  
usufruct  
enures to  
whom?

Stipulatus sum de Titio fundum Cornelianum 1 detracto usu fructu: Titius decessit: quaesitum est, quid mihi heredem eius praestare oportet. Respondit referre, qua mente usus fructus exceptus sit: nam si quidem hoc actum est, ut in cuiuslibet persona usus fructus<sup>1</sup> constitueretur, solam proprietatem heredem debiturum: sin autem id actum sit, ut promissori dumtaxat usus fructus reciperetur, plenam proprietatem heredem eius debiturum. Hoc ita se habere manifestius in causa legatorum apparere: etenim si heres, a quo detracto usu fructu proprietas legata sit, priusquam ex testamento ageretur, decesserit, minus dubitandum, quin heres eius plenam proprietatem sit debiturus: idemque et si sub condicione similiter legatum<sup>2</sup> sit et pendente condicione heres decessit.

Heir's  
delay.

Usus fructus serui Titio legatus est: cum per 2 heredem staret, quo minus praestaretur, seruus mortuus est: aliud dici non posse ait, quam in id obligatum esse heredem, quanti legatarii intersit moram factam non esse, ut scilicet ex eo tempore in diem, in quo seruus sit mortuus, usus fructus aestimetur. Cui illud quoque consequens esse, ut si ipse Titius moriatur, similiter ex eo tempore, quo mora sit facta, in diem mortis aestimatio usus fructus heredi eius praestaretur. Quaesitum est, si, cum in annos decem proximos<sup>3</sup> usum fructum de te dari stipulatus essem, per te steterit quo minus dares et quinquennium transierit, quid iuris sit: item si Stichus decem annorum proximorum operas de te dari stipulatus sim et similiter quinquennium praeteriit. Respondit eius temporis usum fructum et operas recte peti, quod per te transactum est quo minus darentur.

Promiser's  
delay.

Non utitur usufructuarius, si nec ipse utatur nec nomine eius alius, puta qui emit uel qui conduxit uel cui donatus est uel qui negotium eius gerit. Plane illud interest, quod, si uendidero usum fructum, etiamsi

37. IDEM  
Quaest.  
VII.

cf. l. 36, § 2

38. MAR-  
CIANUS  
Inst. III.

<sup>1</sup> Post fructus addit F ex incerta manu reciperetur plenum (ex sequentibus).

<sup>2</sup> Ita dett.; legatus F.

that the heir is answerable to the extent of the legatee's interest in there having been no delay  
the 'next' 10 yrs.' is a vital point in the contract, & so if 5 yrs. elapse, then the balance of 5  
must be compensated for & the usufr. runs for the remaining 5 yrs.  
unless as dist. fr. usufr. might be given by will or contract 5 which has been allowed to

emptor non utatur, uideor usum fructum retinere, 39. GAIUS ad edict. prou. VII.  
 || quia qui pretio fruitur, non minus habere intellegitur, quam qui principali re utitur fruitur. Quod si donauero, non alias retineo, nisi ille utatur. 40. MARCIANUS Inst. III.

Usufruct of statues, more profitable or of poor farms.

Statuae et <sup>invenias</sup> imaginis usum fructum posse relinquere magis est, quia et ipsae habent aliquam utilitatem, 41. IDEM Inst. VII. *where is the use of statues?*  
 si quo loco oportuno ponantur. Licet praedia 1 quaedam talia sint, ut magis in ea impendamus, quam de illis adquiramus, tamen usus fructus eorum relinquere potest. *rather... than 'more... than'*

Use and usufruct.

Si alii usus, alii fructus eiusdem rei legetur, id percipiet fructuarius, quod usuario supererit: nec minus et ipse fruendi causa et usum habebit. 42. FLOR-ENTINUS Inst. XI.

Usufruct in things and in value.

Rerum an aestimationis usus fructus tibi legetur, interest: nam si quidem rerum legetur, deducto eo quod praeterea tibi legatum est, ex reliquis bonis usum fructum feres: sin autem aestimationis usus fructus legatus est, id quoque aestimabitur, quod praeterea tibi legatum est. Nam saepius idem legando non ampliat testator legatum: re autem legata etiam aestimationem eius legando ampliare legatum possumus. 1 *see note p. 212.*

Usufruct in a part.

Etiam partis bonorum usus fructus legari potest: si tamen non sit specialiter facta partis mentio, dimidia pars bonorum continetur. 43. ULP-IANUS Reg. VII.

Usufructuary may not make new.

Usufructuarius nouum tectorium parietibus, qui rudes fuissent, imponere non potest, quia, tametsi meliorem excolendo aedificium domini causam facturum esset, non tamen id iure suo facere potest, aliudque est tueri quod accepisset ac nouum facere<sup>1</sup>. 44. NER-ATIUS membr. III. *rough* *even tho' he wd make the ruins better* *preserve*

Expenses on sick slaves.

Sicut impendia cibari<sup>rebus</sup>orum in seruum, cuius usus fructus ad aliquem pertinet, ita et uoletudinis impendia ad eum respicere natura manifestum est. 45. GAIUS ad edict. prou. VII. *i.e. unnecessary to show by reason*

Undutiful will.

Si extraneo scripto, et emancipato praeterito, matri defuncti deducto usu fructu proprietatem legata sit, petita contra tabulas bonorum possessione plena proprietatem pietatis respectu matri praestanda est. 46. PAULUS ad Plaut. IX.

<sup>1</sup> ac nouum facere ex mea coni.; an nouum faceret F; aliud nouum facere aliquot dett. probante Mommseno.

<sup>2</sup> If the emancipated son 'who has been passed over in favour of the 'outsider' succeeds in breaking the will w. the aid of the special praetorian remedies, does he step completely into the former heir's shoes & take the aft. wch. was reserved in favour of the latter on the property? No, grandmother takes full ownership.



*i.e. before handing it over to the fructuary*

*Heir directed to repair.*

Si testator iusserit, ut heres reficeret insulam, cuius 1  
usum fructum legauit, potest fructuarius ex testa-  
mento agere, ut heres reficeret. Quod si heres hoc  
non fecisset et ob id fructuarius frui non potuisset, heres  
etiam fructuarii eo nomine habebit actionem, quanti  
fructuarii interfuisset non cessasse heredem, licet usus

47. POMP-  
ONIUS ex  
Plaut. v.

*Heir repairs  
w<sup>th</sup> directions*

fructus morte eius interisset. Si absente fructuario  
heres quasi negotium eius gerens reficiat, negotiorum  
gestorum actionem aduersus fructuarium habet, tametsi  
sibi in futurum heres prospiceret: sed si paratus sit  
recedere ab usu fructu fructuarius, non est cogendus  
reficere, sed actione negotiorum gestorum liberatur.

48. PAU-  
LUS ad  
Plaut. ix.

*abandon*

*Produce  
gathered  
out of  
season. hay*

Silvam caedulam, etiamsi <sup>out of season</sup> intemptiue caesa sit, 1  
in fructu esse constat, sicut olea immatura <sup>gathered</sup> lecta, item  
faenum immaturum caesum in fructu est.

*Usufruct  
in common  
charged on  
heirs in  
common.*

Si mihi et tibi a Sempronio et Mucio heredibus  
usus fructus legatus sit, ego in parte<sup>1</sup> Sempronii quad-  
rantem, in parte<sup>1</sup> Mucii alterum quadrantem habebo,  
tu item in utriusque parte eorum quadrantes habes.

49. POMP-  
ONIUS ad  
Plaut. vii.

*Heir's  
right to  
costs.*

*remains to himself  
or else for him.*

Titius Maeuius fundum Tusculanum reliquit eius-  
que fidei commisit, ut eiusdem fundi partis dimidia  
usum fructum Titiae praestaret: Maeuius uillam uetus-  
tate corruptam <sup>built</sup> necessariam cogendis et conseruandis  
fructibus aedificauit: quaesitum est, an sumptus partem  
pro portione usus fructus Titia agnoscere debeat. Re-  
spondit Scaeuola, si priusquam usus fructus praestaretur,  
necessario aedificasset, non alias cogendum restituere  
quam eius sumptus ratio haberetur. 2

50. PAU-  
LUS ad  
Uitell. iii.

*cf. de ad dam*

*Usufruct  
to date  
before  
death.*

Titio 'cum morietur' usus fructus inutiliter legari  
intellegitur, in id tempus uidelicet collatus, quo a  
persona discedere incipit. <sup>fixed</sup>

51. MO-  
DESTINUS  
Differ. ix.

*Payment  
of taxes.*

Usu fructu relicto si tributa eius rei praestentur, 52. IDEM  
ea usufructuarium praestare debere dubium non est,  
nisi specialiter nomine fideicommissi testatori placuisse  
probetur haec quoque ab herede dari.

Reg. ix.

*Building  
and site.*

Si cui insulae usus fructus legatus est, quamdiu  
quaelibet portio eius insulae remanet, totius soli usum  
fructum retinet. 3)

53. IAUO-  
LENUS  
Epist. ii.

<sup>1</sup> partem Codd. Correx.

*cannot be compelled to hand over [the share of the part to Titia] unless accurately taken of expenses' i.e. unless Titia reimburses him to the extent of the expense.*

*cf. case in Fr. 36 where the whole block has disappeared*

condition, when the original condition is not fulfilled, then the orig. ufr. never come into operation. to whom does the reserved ufr. belong? facie to you, unless it be shown that you have reserved it only for the purpose of satisfying the contingent

Convey-  
ance while  
usufruct is  
contingent.

Sub condicione usus fructus fundi a te herede Titio legatus est: tu fundum mihi uendidisti et tradidisti detracto usu fructu: quaero, si non extiterit condicio, aut extiterit et interiit usus fructus, ad quem pertineat. Respondit: intellego te de usu fructu quaerere qui legatus est: itaque, si condicio eius legati extiterit, dubium non est, quin ad legatarium is usus fructus pertineat, et, si aliquo casu ab eo amissus fuerit, ad proprietatem fundi reuertatur. Quod si condicio non extiterit, usus fructus ad heredem pertinebit, ita ut in eius persona omnia eadem seruentur, quae ad amittendum usufructum pertinent et seruari solent. Ceterum in eiusmodi uenditione spectandum id erit, quod inter ementem uendentemque conuenerit, ut si apparuerit legati causa eum usum fructum exceptum esse, etiamsi condicio non extiterit, restitui a uenditore emptori debeat.

54. IDEM  
Epist. III.

i.e. not the ufr. have reserved on but the orig. ufr.

subject to the con- that

sc. to herede

Use of  
infant.

Si infantis usus tantummodo legatus sit, etiamsi nullus interim sit, cum tamen infantis aetatem excesserit, esse incipit.

55. POMP-  
ONIUS  
ad Q. Mu-  
cium XXVI.

Usufruct  
left to a  
town.

An usus fructus nomine actio municipibus dari debeat, quaesitum est: periculum enim esse uidebatur, ne perpetuus fieret, quia neque morte nec facile capitis deminutione periturus est, qua ratione proprietas inutilis esset futura semper abscedente usu fructu: sed tamen placuit dandam esse actionem. Unde sequens dubitatio est, quousque tuendi essent in eo usu fructu municipales: et placuit centum annos tuendos esse municipales, quia is finis uitae longaeui hominis est.

burgisae

56. GAIUS  
ad edict.  
prou. XVII.

no what extent

Apparent  
consolida-  
tion.

Dominus fructuario praedium, quod ei per usum fructum seruiebat, legauit, idque praedium aliquamdiu possessum legatarius restituere filio, qui causam inofficiosi testamenti recte pertulerat, coactus est: mansisse fructus ius integrum ex post facto apparuit.

57. PAP-  
INIANUS  
Respons.  
VII. i.e. he has the u

st. what happened afterwards

Annuities  
falling in.

Per fideicommissum fructu praediorum ob alimenta libertis relicto partium emolumentum ex persona uita decedentium ad dominum proprietatis recurrit.

profit of the sha

Right to  
produce  
when due?

tenants.

Bequest of  
share of  
produce.

the way this is  
for the legatee!

Produce of  
estate.

cf. Fr. 9 § 7. →

Right of  
fructuary  
to  
possession.

to  
possession

to the possessor, even  
not the legal owner

Defuncta fructuaria mense Decembri iam omnibus fructibus, qui in his agris nascuntur, mense Octobri per colonos sublatis quaesitum est, utrum pensio heredi fructuariae solui deberet, quamvis fructuaria ante kalendas Martias, quibus pensiones inferri debeant, decesserit, an diuidi debeat inter heredem fructuariae et rem publicam, cui proprietas legata est. Respondi rem publicam quidem cum colono nullam actionem habere, fructuariae uero heredem sua die, secundum ea quae proponerentur, integram pensionem percepturam.

‘Sempronio do lego ex redactu fructuum holeris et porrinae, quae habeo in agro Farrariorum, partem sextam.’ Quaeritur, an his uerbis usus fructus legatus uideatur. Respondi non usum fructum, sed ex eo quod redactum esset partem legatam. Item quaesitum est, si usus fructus non esset, an quotannis partem sextam redactam legauerit. Respondi quotannis uideri relictum, nisi contrarium specialiter ab herede adprobetur.

Arbores uel tempestatis, non culpa fructuarii euer- sas, ab eo restitui non placet. Quidquid in fundo nascitur uel quidquid inde percipitur, ad fructuarium pertinet, pensiones quoque iam antea locatorum agrorum, si ipsae quoque specialiter comprehensae sint: sed ad exemplum uenditionis, nisi fuerint specialiter exceptae, potest usufructuarius conductorem repellere. Caesae harundinis uel pali compendium, si in eo quoque fundi uectigal esse consuevit, ad fructuarium pertinet.

Cuiuscumque fundi usufructuarius prohibitus aut deiectus de restitutione omnium rerum simul occupatarum agit: sed et si medio tempore alio casu inter- cederit usus fructus, aequae de perceptis antea fructibus utilis actio tribuitur. Si fundus, cuius usus fructus petitur, non a domino possideatur, actio redditur. Et ideo si de fundi proprietate inter duos quaestio sit, fructuarius nihilo minus in possessione esse debet satis-

58. SCAE-  
UOLA  
Respons.  
III.

by way of year  
much less

se pensionis

59. PAUL.  
Sentent.  
III.

60. IDEM  
Sentent. v.

<sup>1</sup> restitui ex mea con. ; substitui Codd.

if the bequest is silent as to the rents, the legatee can't claim them, but he may expel the  
who then may claim compensation for the loss  
being dominus not possessor, he can't claim interdict unde vi, but he has a special interdict  
tion was enough to cover all claims to things withheld from him.  
for some reason other than non-use as the result of his dispossession.



que ei a possessore cauendum est, quod non sit prohibitus frui eum cui usus fructus relictus est quamdiu de iure suo probet. Sed si ipsi usufructuario quaestio moueatur, interim usus fructus eius differtur<sup>1</sup>: sed cauere ei debet de restituendo<sup>2</sup> eo quod ex his fructibus percepturus est, uel si satis non detur, ipse frui permittitur.

*Fructuary may not change.*

Usufructuarius nouum <sup>churnell(?)</sup> riuum parietibus non potest inponere. Aedificium inchoatum fructuarius consummare non posse placet, etiamsi eo loco aliter uti non possit, sed nec eius quidem usum fructum esse: nisi in constituendo uel legando usu fructu hoc specialiter adiectum sit, ut utrumque ei liceat.

61. NERATIUS Respons. II.

(i.e. there is no such a thing as a usufructuary's right to change the thing.)

*Preserves of game.*

Usufructuarius uenari in saltibus uel montibus possessionis probe dicitur: nec aprum aut ceruum quem ceperit proprium domini capit, sed aut fructus<sup>3</sup> iure aut gentium suos facit. Si uiuarii inclusae ferae<sup>1</sup> in ea possessione custodiebantur, quando usus fructus coepit, num exercere eas fructuarius possit, occidere non possit? alias si quas initio incluserit operis suis uel post, siue et<sup>4</sup> ipsae inciderint delapsaeue fuerint, hae fructuarii iuris sint? commodissime tamen, ne per singula animalia facultatis fructuarii propter discretionem difficilem ius incertum sit, sufficit eundem numerum per singula quoque genera ferarum finito usu fructu domino proprietatis adsignare, qui fuit coepti usus fructus tempore.

62. TRYPHONINUS Disput. VII.

*Usufruct granted while out.*

Quod nostrum non est, transferemus ad alios: ueluti is qui fundum habet, quamquam usum fructum non habeat, tamen usum fructum cedere potest.

63. PAULUS de iure singulari.

*How far surrender frees from charges.*

Cum fructuarius paratus est usum fructum relinquere, non est cogendus domum reficere, in quibus casibus et usufructuario hoc onus incumbit. Sed et post acceptum contra eum iudicium parato fructuario

64. ULPIANUS ad edict. LI.

<sup>1</sup> Sic Mommsen cum dett.; offertur F.

<sup>2</sup> Codd. cauere de restituendo.

<sup>3</sup> Sic Mommsen: fructus aut iure F; fructus aut iure ciuili aliquot dett.

<sup>4</sup> siue et ex mea con.; sibimet Codd.

derelinquere usum fructum dicendum est absolui eum<sup>1</sup> debere a iudice. Sed cum fructuarius debeat quod suo suorumque facto deterius factum sit reficere, non est absoluendus, licet usum fructum derelinquere paratus sit: debet enim omne, quod diligens pater familias in sua domo facit, et ipse facere.

*Heir need not repair.* Non magis heres reficere debet quod uetustate iam deterius factum reliquisset testator, quam si proprietatem alicui testator legasset.

*Fructuary not to torture slave.* Cum usufructuario non solum legis Aquiliae actio competere potest, sed et serui corrupti et iniuriarum, si seruum torquendo deteriorem fecerit.

*Sale of usufruct.* Cui usus fructus legatus est, etiam inuito herede eum extraneo uendere potest.

*Children are not produce.* Uetus fuit quaestio, an partus ad fructuarium pertineret: sed Bruti sententia optinuit fructuarium in eo locum non habere: neque enim in fructu hominis homo esse potest. Hac ratione nec usum fructum in eo fructuarius habebit. Quid tamen si fuerit etiam partus usus fructus relictus? an habeat in eo usum fructum? et cum possit partus legari, poterit et usus fructus eius.

*Young of animals are.* Fetus tamen pecorum Sabinus et 1 *Case of herd.* Cassius opinati sunt ad fructuarium pertinere. Plane, 2 si gregis uel armenti sit usus fructus legatus, debebit ex adgnatis gregem supplere, id est in locum capitum defunctorum || uel inutilium alia summittere, ut post

substituta ea fiant priora<sup>2</sup> fructuarii, ne lucro ea res cedat domino. Et sicut substituta statim domini fiunt, ita priora quoque ex natura fructus desinunt eius esse:

nam alioquin quod nascitur fructuarii est, et cum substituit, desinit eius esse. Quid ergo si non faciat nec suppleat? teneri eum proprietario Gaius Cassius scribit libro decimo iuris ciuilibis. Interim tamen, 1

quamdiu summittantur et suppleantur capita quae demortua sunt, cuius sit fetus, quaeritur. Et Iulianus libro tricensimo quinto digestorum scribit pendere eorum dominium, ut, si summittantur, sint proprietarii, si non

<sup>1</sup> eam F.    <sup>2</sup> Codd. substituta fiant propria. Uide adnotationem.

65. POMPONIUS ex Plautio v.

66. PAULUS ad edict. XLVII.

67. IULIANUS ex Minicio I.

68. ULPIANUS ad Sab. XVII.

69. POMPONIUS ad Sab. v.

70. ULPIANUS ad Sab. XVII.

summittantur, fructuarii: quae sententia uera est. Secundum quae, si decesserit fetus, periculum erit <sup>2</sup> fructuarii, non proprietarii, et necesse habebit alios fetus summittere. Unde Gaius Cassius libro octauo scribit carnem fetus demortui ad fructuarium pertinere. Sed quod dicitur debere eum summittere, <sup>3</sup> totiens uerum est, quotiens gregis uel armenti uel equitii, id est uniuersitatis, usus fructus legatus est: ceterum, si singulorum capitum, nihil supplebit. Item <sup>4</sup> si forte eo tempore, quo fetus editi sunt, nihil fuit quod summitti deberet, nunc est<sup>1</sup> post editionem: utrum ex his quae edentur summittere debebit, an ex his quae edita sunt, uidendum est. Puto autem uerius, ea quae pleno grege edita sunt ad fructuarium pertinere, sed posteriorem gregis casum nocere debere fructuario. Summittere autem facti est, et Iulianus proprie dicit <sup>5</sup> dispertire et diuidere et diuisionem quandam facere: quod dominium erit summissorum proprietarii.

*Building  
on plot.*

Si in area, cuius usus fructus alienus esset, quis aedificasset, intra tempus quo usus fructus perit superficie sublata, restitui usum fructum ueteres responderunt.

71. MAR-  
CELLUS  
Digest.  
xvii.

*Contingent  
legacy by  
bare  
owner.*

Si dominus nudae proprietatis usum fructum legauerit, uerum est, quod Maecianus scripsit libro tertio quaestionum de fideicommissis, ualere legatum: et si forte in uita testatoris uel ante aditam hereditatem proprietati accesserit, ad legatarium pertinere. Plus admittit Maecianus, etiamsi post aditam hereditatem accessisset usus fructus, utiliter diem cedere, et ad legatarium pertinere.

72. ULP-  
IANUS ad  
Sab. xvii.

*Building  
on plot.*

Si areae usus fructus legatus sit mihi, posse me casam ibi aedificare custodiae causa earum rerum, quae in area sint.

73. POMP-  
ONIUS  
ad Sab. v.

*Usufruct  
left to com-  
mon slave.*

Si Sticho seruo tuo et Pamphilo meo legatus fuerit usus fructus, tale est legatum, quale si mihi et tibi legatus esset: et ideo dubium non est, quin aequaliter ad nos pertineat.

74. GAIUS  
ad edict.  
prou. vii.

<sup>1</sup> Codd. dett. est; F et.





## NOTES.

**1 1. usus fructus]** ‘use and produce’. Cf. Cic. *Top.* 3 § 17; 4 § 21. The conjunction is sometimes expressed, e.g. Cic. *Caecin.* 4 § 11 *usum et fructum omnium bonorum suorum Caesenniae legat* (some mss. omit *et*); 7 § 20 *usus enim eius fundi et fructus testamento uiri fuerat Caesenniae*; *Fam.* vii. 30 § 2 *proprium te esse scribis mancipio et nexo, meum autem usu et fructu*; Sen. *Ep.* 73 § 9; 98 § 11 *rem nobis eripit casus, usum fructumque apud nos relinquit*. So also *uti frui*. Other like combinations are *sarta tecta* (see note on 1 7. § 2); *ruta caesa* (Cic. *Top.* § 100); *ruta et caesa* (D. xix. 1. 1 17. § 6). In some other expressions two correlative sides of the same transaction are named, e.g. *empti uenditi actio* (D. xix. 1), *locati conducti* (ib. 2); and probably *pactum conuentum* (D. ii. 14. 1 7. § 7).

**ius]** The usufruct e.g. of a landed estate, is not the estate itself, nor the produce of the estate, but the right to use it and to take the produce. Hence it is *ius* ‘a right’, as opposed to *corpus*, a physical or corporeal thing, for which *res* is often used, though *res* is also a general term including *iura*: Cf. Gai. ii. 12—14 *Quaedam res corporales sunt, quaedam incorporales. Corporales hae quae tangi possunt, uelut fundus, homo, uestis, aurum, argentum, et denique aliae res innumerabiles. Incorporales sunt quae tangi non possunt, qualia sunt ea quae iure consistunt, sicut hereditas, usus fructus, obligationes quoquo modo contractae*. D. v. 3. 1 17. § 2 (Gaius) *Placuit uniuersas res hereditarias in hoc iudicium uenire, siue iura siue corpora sint*; xxxix. 2. 1 13. § 1 (Ulp.) *siue corporis dominus siue is qui ius habet, ut puta seruitutem*; ib. 1 19. pr. *siue domini sint siue aliquid in ea re ius habeant, qualis est creditor et fructuarius et superficiarius*.

**alienis]** No one can have a usufruct or any other easement in his own thing. *Qui habet proprietatem, utendi fruendi ius separatum non habet; nec enim potest ei suus fundus seruire* (D. vii. 6. 1 5. pr.). But a man may have a usufruct in a thing which is the common property of himself and another (2. 1 9).

**salua rerum substantia]** ‘without consuming the things themselves’. The use of a thing in ordinary language generally implies the continuance of the thing after the use; using it up or consuming it is a different matter (see note on *abuti*, p. 117). None but the owner enjoys and can

destroy if he choose : a usufructuary is not as such entitled to consume the thing itself, even though he replace it. A quasi-usufruct was, however, introduced by a Senate's decree (in or before Tiberius' reign) in the case of things consumable in use but capable of being replaced by like quantities of the same kind of thing (D. VII. 5. l 1 ; l 7). The relation between usufruct and this quasi-usufruct was analogous to that between *commodatum* and *mutuum* (D. XLIV. 7. l 1. §§ 2, 3).

l 2. **ius in corpore**] 'right of dealing with a material thing'. There cannot be a usufruct of an incorporeal thing, e.g. of a servitude. *Nec usus nec usus fructus itineris, actus, viae, aquae ductus, legari potest, quia servitus servitutis esse non potest* (D. XXXIII. 2. l 1). But a life-enjoyment of a road or other servitude may be otherwise secured (*ib.*). This principle was probably the origin of the doctrine that 'no use could be limited on a use', applied by the Court of Chancery to reestablish trusts after the Statute of uses (Blackstone *Com.* II. 335).

**quo sublato**] The destruction of the thing involves, of course, the destruction of any usufruct in it. Cf. D. VII. 4. l 5. § 2, &c.

l 3. pr. **omnium praediorum**] (a) 'All' i.e. 'any, landed estates' = 'every landed estate'. So *omni fructuario* l 25. fin. Cf. Cic. *Att.* I. 16. § 12 *Philippus omnia castella expugnari posse dicebat in quae modo asellus onustus auro posset ascendere* ; D. I. 16. l 9. § 1 *Omnia quaecumque causae cognitionem desiderant, per libellum non possunt expediri*. Below in l 29 *omnium* is used collectively. See note.

(b) *praedia* is a general term for 'landed property'. The term is due to the habit of giving real as well as personal security. Cf. Cic. *Verr.* I. 54. § 142 *ubi illa consuetudo in bonis praedibus praediisque uendundis omnium consulum?* Cf. *Lex Agrar.* (Bruns) vv. 74, 84 ; *Lex Malac.* §§ 60—65. *Praedia urbana* are town houses, though in some connexions a residence or even lodgings or stables for hire in the country may be so called (D. L. 16. l 198 ; VIII. 4. l 1 ; cf. XX. 2. l 4) ; *praedia rustica* are farms (including the farm-houses and buildings) or nursery gardens (D. L. l. c.).

(c) The expression *omnium praediorum* &c. seems naturally to be used in a contrast with some other mode of legacy which applied only to some landed estates. Now before Justinian a legacy had different conditions and incidents according to the form in which it was couched (see Gai. II. § 192 sqq. ; Ulp. XXIV. § 2 sqq. ; Paul. *Sent.* III. 6. l 1 sqq.). The two principal forms were *per uindicationem* and *per damnationem*. The former gave the legatee the property in the thing bequeathed immediately on the will being made effective by the heir's entering. But it was a necessary condition of this form of legacy that the thing bequeathed should have been at the time of the testator's death his property *ex iure Quiritium*. The scope of this form of bequest was therefore limited. Things which were merely *in bonis* (and to this *ex iure Quiritium* is usually opposed cf. Gai. I. 54 ; II. 40, 41 ; Cod. VII. 25) could not be so bequeathed ; nor could things which belonged to another person altogether. This form was not therefore



applicable to all *praedia*. A senate's decree however, passed on the proposal of Nero, cured this defect in practice, and declared that, even if a thing had not belonged to the testator, it might pass by this form of bequest, as well as if it had been left in the form most widely applicable. Such a form was the legacy *per damnationem*, by which the heir was bound to convey the property in the thing bequeathed to the legatee, whether it was or was not the testator's in the strictest or in any sense. If it belonged to some one who would not part with it, the heir was liable for the value (Gai. II. 202; D. XXXII. l 14. § 2). The legatee had by the will no property in the thing bequeathed: he had only a claim on the heir to procure it and convey it. It is clearly this form of bequest that is here referred to as applicable to all *praedia* (see note on *iubeatur dare*, p. 34). On this view the use of *omnium* has an intelligible force, and the words may therefore have been written by Gaius as the Digest gives them. Indeed Ulpian XXIV. §§ 7, 8, after describing *per vindicationem legari*, proceeds *Per damnationem omnes res legari possunt etiam quae non sunt testatoris, dum modo tales sint quae dari possint*. This parallel gives strong support to the above view.

(d) Hasse (*Rhein. Mus.* I. pp. 110 sqq.) and Arndts (in Glück's *Pand.* XLVI. p. 19, note) suggest that Gaius wrote *prouincialium* (*praediorum*) and that Tribonian substituted *omnium*. This supposition derives some support from its affording a ready explanation of the next sentence. If Gaius is speaking only of provincial land, the mention of bargains and stipulations as the mode of constituting a usufruct *inter vivos* becomes intelligible (see Gai. II. 31). Otherwise we must suppose a considerable omission by Tribonian (see p. 35). This view of Hasse's rests however on the principle, generally held, that bequest by vindication (whether of the property or of the usufruct) was not applicable to provincial land (except of course such as had received Italic rights, Plin. III. § 25; § 139; Savigny *Verm. Schr.* I. p. 30 sqq.). Land in the provinces was not capable of mancipation (Gai. II. 15); nor of surrender in court (ib. 31), nor of usucapion (ib. 46). So much is certain: but I find no such express statement as regards vindication: and legacy by vindication and surrender in court have not always like incidents (Vat. Fr. 49). But in vindication, as in mancipation and surrender in court, the claimant had to assert that the thing was his *ex iure Quiritium*; and bequest *per vindicationem* was applicable only to things which were the testator's *ex iure Quiritium*. So that the question is, Could a Roman citizen assert that land in the provinces (in places not specially excepted from the ordinary provincial law by being made *Italicus iuris*) was his *ex iure Quiritium*? Now the rights enjoyed by the Quirites as owners of property covered all kinds of property corporeal and incorporeal, moveable and immoveable, but did not follow the lines indicated by these distinctions. The chief Roman division of things as subjects of property was into *res Mancipi* and *res nec Mancipi*. *Res Mancipi* contained all immoveables in Italy, some moveables, viz. slaves and beasts of draught, and some incorporeal things, viz. *servitutes prae-*

*diorum rusticorum*. Immoveables out of Italy (except those *Italicis iuris*), all moveables except slaves and beasts of draught, and other incorporeal things, even *servitutes praediorum urbanorum*, were *res nec mancipi* (Gai. II. 12—17). But *res nec mancipi* were owned *ex iure Quiritium* just as much as *res mancipi*. Money could be claimed by vindication, and could be bequeathed *per vindicationem* (Gai. II. 196) as much as a slave or a house or land. The difference was merely in the mode of conveyance. It needed only simple delivery on the part of the owner to pass the property in money (*res nec mancipi ipsa traditione pleno iure alterius fiunt*, Gai. II. 19), and land in the provinces was in the same position (*in eadem causa sunt provincialia praedia*); that is to say, mere delivery at once vested in a person the full rights of ownership in provincial land. And ‘full rights’ (*plenum ius*) was expressly used by Gaius to denote not merely the practical control, but the strict right of ownership, (*proinde pleno iure incipit, id est et in bonis et ex iure Quiritium, tua res esse*, II. 41). The proof seems clear and complete, that provincial lands, duly delivered by their owner, became the property of the new acquirer *ex iure Quiritium*. Unfortunately two sections of Gaius (II. 26, 27) which very probably dealt with this question, are so imperfectly preserved that their purport is unknown. Huschke (notes *ad loc.*) supposes that they contained an express warning against this conclusion. That is mere hypothesis; but there are two lines of argument which are brought against the conclusion and require distinct notice.

(e) The first is derived from the language of Gaius II. 7, and of a passage in Aggenus Urbicus which Lachmann attributes to Frontinus. Gaius says *In provinciali solo placet plerisque solum religiosum non fieri, quod in eo solo dominium populi Romani est uel Caesaris, nos autem possessionem tantum uel usum fructum habere uidemur*<sup>1</sup>. Frontinus or Aggenus (*Grom.* p. 56) in contrasting the legal position of land in Italy and land in the provinces says of the *agri stipendiarii* (i.e. taxed lands in the senatorial provinces, Gai. II. 21) *neum non habent, neque possidendo ab alio quaeri possunt, possidentur tamen a priuatis sed alia condicione, et ueneunt sed nec mancipatio eorum legitima potest esse. Possidere enim illis quasi fructus tollendi causa et praestandi tributi condicione concessum est. Vindicant tamen inter se non minus fines ex aequo ac si priuatorum agrorum* (cf. Gai. II. 26). Theophilus *Inst.* II. 1 § 40, probably borrowing from Gaius, says that those who occupied the provincial lands subject to tribute or tax, were

<sup>1</sup> Cf. the English feudal law: “All the lands and tenements in England in the hands of subjects are holden mediately or immediately of the king.” Coke on Litt. p. 1 a; Blackstone, *Com.* II. p. 59. “Absolute ownership is an idea quite unknown to the English law. No man is in law the absolute owner of lands. He can only hold an estate in them.” Josh. Williams, *Real Prop.* ch. i. “In many of the United States there were never any marks of feudal tenure, and in all of them the ownership of land is essentially free and independent” i.e. either really allodial or only nominally feudal, although much of the technical language of feudality is still preserved. Kent, *Comm.* Pt. VI. Lect. 53 (Vol. III. p. 488 = 638 ed. 9).

not *domini* but had only the usufruct and fullest possession (see, amongst others, Matthiass *Grundsteuer*, p. 31 sqq.). Now it will be observed that Gaius does not speak of this theory as more than a lawyer's interpretation of the facts (*habere uidetur*, cf. Gai. II. 89); and in its application to the question of land becoming *religiosus*, implies that some (for he says only *plerisque*) drew no distinction between Italian and provincial land. As this theory gave ownership to the State, the provincials could have only some inferior right, which he calls loosely 'possession or usufruct'. That Gaius did not regard it as technically a usufruct is clear from his saying that provincial lands passed by delivery, and that usufructs did not. In truth he uses 'possession or usufruct' simply to denote the *de facto* position of an owner, which yet theory prevented him from calling ownership. Such a *de facto* position Frontinus also attributes to provincial lands. They were not capable of strict mancipation, or of usucapion: but they could be possessed, could be sold, and could be vindicated: only they had to pay taxes or ground-rent, and that did not accord with the Roman conception of an owner. Ownership therefore in this case lay with the sovereign who took taxes or ground-rent from the provincials by the same principle that a lessor takes rent from a lessee. So the tenure of the provincials must be reduced to possession or usufruct conditional on their paying taxes. Now it is curious that these same expressions ('possession', 'usufruct') are demonstrably used of owners in the provinces who were not subject to taxes. The *lex Antonia de Termessibus* A. U. C. 683 (*Corp. I. L.* I. No. 204 = Bruns, p. 85) declared the Thermenses in Pisidia to be free, friends, and allies of the Roman people and to enjoy their own laws: they are to continue to have, possess, use and enjoy (*habere possidere uti fruique*) lands, buildings and all other things public and private which they have hitherto had, possessed, used and enjoyed, and had not voluntarily parted with (capp. 2, 3). The same terms appear to be also used of holders of land in various legal positions in Italy in the *lex agraria* A. U. C. 643 (*Corp. I. L.* I. No. 200 = Bruns, p. 67) and of some (line 12) who held land 'given and assigned' them by agrarian commissioners and presumably therefore in private ownership (cf. Rudorff *Grom. Inst.* p. 372; contra Mommsen *C. I. L.* pp. 90 b; 101 a). They are in deeds of purchase of slaves, Bruns, pp. 206, 207.

(f) Some words in this passage of Frontinus deserve especial note. Rudorff takes *uindicant ex aequo* as opposed to *ex iure Quiritium* and to mean (I suppose) 'on grounds of equity' (*Grom. Inst.* pp. 317, 375). That however is *ex aequo et bono*. But *ex aequo* is 'on a level', 'on equal terms' (Liv. xxxvii. 36 § 5; Plin. *H. N.* vi. § 112; Suet. *Tib.* 11; Tac. *Germ.* 36) and either contrasts the position of provincials amongst themselves with the position of the whole of them relative to the Roman State, (in which case *ac si* goes with *non minus*—a possible but not a frequent use of *ac*; cf. Catull. 61, 169 *illi non minus ac tibi*, Verg. *A.* iii. 561 *haut minus ac iussi faciunt*); or compares the position of these holders of usufruct and possession with that of private owners; which seems the



more natural meaning and construction. 'Not the less however do they assert against one another their claims to their boundaries just as if the land was their private property'. (For *non minus*, cf. l 39; for *ex aequo* compare *Laudatorum principum usus ex aequo* (Tac. *H.* 74); *qui pluribus locis ex aequo negotiatur*, i.e. just as much in one place as another, D. L. l. 1 5). But though vindication is thus expressly applied to provincial lands, the passage is not decisive of the present question, as it relates to the action of provincials, who certainly could not claim land *ex iure Quiritium*. They were debarred from doing so, not on account of the incapability of the land but of their own personal incapacity. The form doubtless would be modified accordingly.

(g) The second line of argument is that used by Savigny, who rightly regarded this theory of the Roman jurists as scarcely more than an hypothesis or a publicist fiction, and one of no importance in private transactions (*Besitz* § 9. 2, note; *Verm. Schr.* I. p. 46; II. p. 104). Savigny therefore regards all land in the provinces whether in the free communities or subject to tax or tribute (with the exception only of land made *Italici iuris*), as incapable of Quiritary ownership, on the general ground that immoveables are regulated by the law of the country where they are situate<sup>1</sup>. But in the first place one is giving fair weight to this principle, if we presume the conditions of conveyance required among the inhabitants of Illyria or Cilicia to be followed by Roman citizens desirous of holding land there. It would surely be carrying it too far to assert that a Roman citizen, having so acquired it, cannot hold it as his property. And if it be his property, does he not hold it *ex iure Quiritium*?<sup>2</sup> Gaius expressly says, delivery conveys the full property in provincial lands. A Roman citizen gets an estate delivered to him in Cilicia by the owner; how can we say this estate is not his *ex iure Quiritium*? For *ex iure Quiritium* does not imply that it must be acquired by methods peculiar to the Quirites: it simply means 'in accordance with rights enjoyed by the Quirites' (cf. *ius Quiritium consequuntur*, Gai. I. 32 c, 35, &c.), and delivery was just as much in accordance with those rights as regards one class of things, as mancipation and surrender in court and usucapion were as regards others.

And in the second place the distinction between moveables and im-

<sup>1</sup> Savigny's words are *Der wahre und allgemeine Grund jener Unmöglichkeit lag in der höchst natürlichen Regel die der französische Code Art. 3 so ausdrückt: Les immeubles, même ceux possédés par des étrangers, sont régis par la loi française*. Böcking (*Pand.* § 74 n. 25) quite misunderstands this, as if *par la loi française* were analogous to the Roman law, instead of to the law of the place, whether Italian or provincial.

<sup>2</sup> Part of Mommsen's words used of the Gracchan colonies in Africa are exactly applicable *Agnum in provinciis situm fieri potuisse dominorum ex iure Quiritium Rudorffius rectissime docet* (Feldm. II. 373) *estque haec condicio agri quae postea ius Italicum appellatur; hac uero aetate quicquid cuius Romani iure fuit, eius fuit ex iure Quiritium, nec nisi multo posteriore iureconsulti inuenerunt agnum a populo Romano cui Romano ita dari posse ut eius esset iure peregrino* (*Corp. I. L. I. p. 97 b*),

moveables was not the one ruling the Roman notions on these matters. They probably felt the inconvenience of these special modes of conveyance, and extended them no further than they could help. They classed provincial lands with *res nec Mancipi*, as they classed camels and elephants with *res nec Mancipi*, for the simple reason that neither being known when the form of *Mancipium* was the regular conveyance for all important property, sentiment did not require the application of this form, and convenience forbad its extension. But they did not give up the claim to ownership, because they refused to force the use of a burdensome conveyance, and they held as Roman citizens what they acquired by mere delivery, whether moveable or immoveable, if it was not included in the limited number of things which formed the early Roman farmer's holding and stock, and which were only parted with under the solemn forms of an ancient ceremonial.

(h) I do not lay stress in this argument on the occasional use in the Vatican fragments of the terms *dominus*, *dominium* (§§ 315, 316) or *proprietas* (§ 315) applied to stipendiary lands, for these words might be used somewhat loosely of what all recognised to be *de facto* ownership. Nor can much support be drawn from the fact that, even if the provincial lands were held only as a usufruct, still usufructs were capable of being vindicated (D. VII. 6. 15. § 1); for, as I have shewn, this would be taking Gaius' language too literally. Nor do I discuss whether any form of bequest, the same as, or similar to, that by the words *do lego* (see note on 1 19. pr.), was used by the provincials. All that I question is whether there is any sufficient reason for supposing that a bequest, by a Roman citizen to a Roman citizen, in the words *do lego*, of an estate in the provinces, subject to tax, would have been invalid even before the passing of the senate's decree in Nero's time.

**iure legati**] There is a special title on the subject of bequests of usufruct and the like, D. XXXIII. 2. Bequest was evidently the principal way of treating a usufruct, and very probably the earliest. See note on 1 25. § 7. The desire of providing according to their several ages and needs for the members of a testator's family naturally led to the practice of giving a life interest in certain property to some, while giving the property itself, subject to the life interest, to others.

On the origin of *legatum*, *legare* see note on 1 19. pr.

**constitui**] 'created'. *Constituere* is frequently used in this sense ('create', 'establish', 'settle', 'appoint') of bringing definitively into being a legal relation. So especially of creating a usufruct or other easements (Gai. II. 31; Vat. Fr. 47, 48, 52, 77, 82, &c.; D. VIII. 1. 15. pr., &c.); of creating an obligation (D. XLIV. 7. 1 3. § 1); of settling a price (*universis Mancipiis constitutum pretium*, D. XXI. 1. 1 36), or the amount of a debt (D. XIII. 5, *de pecunia constituta*); of obtaining a new status (*sui iuris constitutos*, D. XXV. 3. 1 5. § 1); of making a person surety (*qui pro se constituisset mulierem ream*, D. XVI. 1. 1 1. § 2); of appointing a procurator

(Gai. iv. 84) or guardian (ib. 85). It is frequently used of the action of the Emperor, senate, people, or other legislative authority (D. i. 2. l 2, *passim*; 3. l 3, l 8, l 11, &c.).

**ut heres iubeatur dare]** These words point to a legacy *per damnationem* which is thus described by Gaius II. 201 *Per damnationem hoc modo legamus, 'Heres meus Stichum servum meum dare damnas esto': sed et si 'dato' scriptum fuerit, per damnationem legatum est.* See also above, p. 28, bottom. The difference between the two forms of legacy, that by *do lego* and that by *heres dare damnas esto*, was in fact the difference between giving a right to the thing, and giving a claim on the heir: the former gave a real title (*vindicatio*); the latter a personal obligation; the former legatee said *rem meam esse*; the latter *heredem rem dare oportere*.

**dare]** The English word 'give' corresponds fairly with *dare*, except that *dare* does not imply, as 'give' sometimes does, 'give gratuitously' 'make a present of'. That is *donare* or *dono dare* (D. xxxix. 5. l 1. pr.; XLIV. 7. l 3. § 1). *Dare* is the opposite of *accipere*, and means 'to grant' or 'make over' from oneself to another in wide extent of application, either of incorporeal things, e.g. *dare responsum, testimonium, operas, ueniam, causam, libertatem, privilegium, iura, actionem, exceptionem, usumfructum, iter* ('right of road') &c.; or of persons appointed, e.g. *dare tutorem, iudicem*; or of corporeal things, the context alone deciding the purpose of the business, e.g. *libellum dare*, 'give in a petition'; *pecuniam*, 'pay over money' (D. XII. 4; *soluere* would imply a previously existing debt); *mutuum*, or *mutuam pecuniam*, 'pay over money in exchange' for money afterwards to be paid back, i.e. 'to make a loan', the property in the coins being conveyed; *rem utendam*, 'to lend' (D. XIII. 6. l 1. § 1); *rem custodiendam*, 'to deposit for safe keeping' (D. XVI. 3. l 1. pr.); *rem pignori* 'to pledge' (D. XIII. 7. l 1). See Böcking *Pand.* § 83 *h.* *Dare* is frequently used in opposition to *facere*, e.g. D. XIX. 5. l 5 pr.; so especially in stipulations and in the forms used in personal actions, in both of which it meant a transfer of the property in a thing (Gai. III. 99; IV. 4; D. XLV. 1. l 56. § 7; l 126. § 1; XLVI. 1. l 75. § 10, &c.). The word occurs in both the principal forms of legacy, that which gave a real action having the words *do, lego*; that giving a personal action against the heir on the will (D. XLIV. 7. l 5. § 2) having *heres dare damnas esto* or *heres dato* (Gai. II. 193, 201). This use of *do* with another more specific verb is like the form used of grants of public land in full ownership to private persons *dedit adsignavit* (*Lex Agrar.* 3, 7, 11, 16, &c.), which was so technical that it was inscribed on the boundary-stones, '*datus adsignatus*' (Sic. Flacc. in *Grom.*, p. 156, ed. Lachm.). It will be seen that the general meaning of *dare* 'give over', 'convey', is in each case made more definite by the addition of a precise term (*adsignare, legare, pignori, mutuum, utendum, custodiendum, &c.*).

**intellegitur, si induxerit]** The meaning of *dare* would naturally vary with the subject of the legacy. If a landed estate was left (not *per vindicationem*) the heir would convey the property and give the legatee possession.



*Legatarius in personam agere debet, id est intendere heredem sibi dare oportere, et tum heres si (res) Mancipi sit, Mancipio dare aut in iure cedere possessionemque tradere debet: si nec Mancipi sit, sufficit si tradiderit* (Gai. II. 204). A usufructuary did not possess in the strict sense, for he did not hold, or claim to hold, as owner: but he of course had, or was entitled to have, the physical possession of that of which he had the usufruct. Gaius says (II. 93) *usufructuarius non possidet, sed habet ius utendi fruendi*. Ulpian (D. x. 2. 15. § 1) speaks of him *qui ususfructus nomine rem teneat, quamvis nec hic utique possideat*; and again (D. XLIII. 16. 13. § 17) *Qui ususfructus nomine qualiterqualiter fuit quasi in possessione, utetur hoc interdicto*; and again, *non possidet legatum, sed potius fruitur* (Vat. Fr. 90). The heir has so far as possible to effect this. If the ownership of the land is not in the heir, either as part of his own estate, or of that of the testator and not bequeathed away from him, the heir has to 'induct' the legatee of the usufruct, i.e. put him into the *de facto* possession. If the ownership of the estate is in the heir, it is only necessary that *patiatur eum uti frui*.

The term *induxerit* is used of a *fideicommissum* by Gaius (D. XXXIII. 2. 129) *Si quis usumfructum, legatum sibi, alii restituere rogatus sit, eumque in fundum induxerit fruendi causa*; and by Ulpian (D. XLIII. 4. 13. pr.) *Si quis missus fuerit in possessionem fideicommissi seruandi causa et non admittatur, potestate eius induendus est qui eum misit*; and of a gift in a rescript of the year 249, *Perfectis donationibus in possessionem inductus* (Vat. Fr. 272). In an opposite sense was used *deducere* in Cicero's time of the formal turning out of possession, Cic. *Caecin.* 7; *Tull.* 16 *appellat Fabius ut aut ipse Tullium deduceret aut ab eo deduceretur. Dicit deducturum se Tullius*.

**et sine testamento**] It is clear to any one, reading Gai. II. 28—33, that unless this passage was originally applicable only to provincial lands (see note above on *omnium*) it must have been much altered by Tribonian. At least some such words as those following in brackets must have been cut out. *Et sine testamento si quis uelit usumfructum constituere [in Italicis quidem praediis ualet in iure cessio, et in Mancipanda proprietate ususfructus detrahi potest, in prouincialibus autem praediis] pactionibus et stipulationibus id efficere potest*. In Gaius' time there were two modes of establishing by private act a usufruct (as well as other servitudes), viz. either by a legacy in the form *do lego* or by a surrender in court. Moreover mancipation was available to establish a usufruct in the person of the owner himself, who might, in conveying the property by mancipation, reserve to himself the usufruct (Vat. Fr. 47). But the legacy *do lego* was restricted in its application; and surrender in court and mancipation did not apply to land outside of Italy (except such as had received the *ius Italicum*), though they did apply to slaves and animals. Nor was either form available except where both parties were Roman citizens. Some substitutes for these forms had to be adopted. The difficulty inherent in

the *do lego* bequest was met by the testator, instead of at once conveying the property by will to the legatee, imposing (*per damnationem*) on his heir the duty of putting the legatee into possession. The difficulty as regards the conveyance *inter vivos* was met in a similar way. A bargain (*pactio*) was made, and in order that it might be legally enforceable, the bargain was ratified by a formal stipulation. The bargain, i.e. the statement of the right intended to be created, and the conditions thereof, was in fact the material portion of a surrender in court or of a mancipation, *minus* the solemn procedure. In lieu of this solemn procedure, a stipulation was added. It is natural to suppose that, just as in the bequest *per damnationem*, the testator's words were followed by a quasi-delivery on the part of the heir, so in this case the spoken bargain was followed or accompanied by a quasi-delivery. But was such a quasi-delivery necessary to the valid establishment of the usufruct? It is not said so; and the opinions of modern jurists are greatly divided on the question. It was not, after Justinian, necessary in case of a legacy; for any and every legatee by Justinian's constitution (Cod. vi. 43. l 1. § 1) had the right to bring *vindicatio* and therefore a complete title, and he could call on the heir to give him the *de facto* enjoyment. There are, however, no such positive words in the case of an establishment of a usufruct *inter vivos*. But if and when, either for the perfecting of his title, or for the enjoyment of his right, the fructuary was put or came into actual possession of the land, he would have a right to the protection afforded by the interdicts (D. VIII. 1. l 20), e.g. the *interdictum uti possidetis* (D. XLIII. 17. l 4), and the interdict *de vi* (ib. 16. l 3. § 13 sqq.), and (presuming the due conditions) to the *actio Publiciana* (D. vi. 2. l 11. § 1; cf. D. XLIII. 18). These interdicts were called *utiles*, i.e. not strictly legal, but 'practically available' because the possession of the fructuary was not a possession as owner (Vat. Fr. 90—92); and moreover, so far as provincials were concerned, was outside of the civil law. Whether, without thus being in physical possession, the fructuary could by the force of bargain and stipulation have an action not only against the promiser and his heirs, but also against the assignee of the promiser or against any other owner of the reversion, is a question not easily determinable (cf. D. XLIV. 7. l 3; VII. 9. l 3. § 4). See the discussion and references in Vangerow, § 350; Baron, § 167; Vering, § 155; Wächter, § 159; Jhering *Jahrbuch*, x. p. 553 sqq.; Karlowa *Rechtsgeschäft*, § 35. For English law see Spencer's case and the commentators on it (Smith's *Leading Cases*).

Both the forms of mancipation and surrender in court went out of use before Justinian, though the word *mancipare* was used in law-deeds afterwards, apparently merely as an old term. The actual ceremonies probably ceased in the fourth century, a shadow of mancipation remaining for a time in solemn delivery before five witnesses (Voigt *Ius Nat.* II. 925—936, 938). Justinian expressly abolished the distinction between *res Mancipi* and *nec Mancipi* (Cod. VII. 31); and when speaking of establishing a

servitude by legacy he adopts the language suitable to the *legatum per damnationem* (D. VIII. 1. 1 16=Just. II. 3. § 4), that being the most generally applicable, and any specific distinction between the forms of bequest being abolished (Just. II. 20. § 2; Cod. VI. 43. 1 1. § 1).

**pactionibus]** (a) There is no apparent reason why the plural should be used in this context, *si quis uelit usumfructum constituere potest*. Nor have I found any instance of it applied to a singular subject in the Digest. Justinian's *Institutes* have it applied in the same words to usufruct in II. 4. § 1, and to real servitudes in II. 3. § 4. The latter section is mainly taken from the same book of Gaius (*Rer. Cott.* II.) from which our passage comes (see D. VIII. 4. 1 16). Probably Gaius used the plural, because he was speaking both of real and personal servitudes, precisely as he does in II. 31, and Tribonian has cut out real servitudes, as he probably cut out the distinction between Italian and provincial lands (see above on *et sine testamento* p. 35).

(b) *Pactio* is used indifferently with *pactum*, except in the old phrase *pactum conuentum*; see D. II. 14. Ulpian defines it as *duorum pluriumue in idem placitum consensus*, and proceeds to explain *conuentio* as the most general word applicable to every contact of persons out of which an obligation arises (ib. 1 1). *Contractus* is used mainly in opposition to *delictum*, these being the two chief sources of obligation. *Pacta*, *pactiones* are used generally of bargains which are not made in the solemn form of stipulation, nor are denoted by such special names as *emptio*, *uenditio*, *societas*, *depositum*, &c. (ib. 1 1. § 4; 1 7. § 1), but are preparatory or ancillary to other contracts (see note on 1 23). In D. L. 17. 1 73. § 4 (taken from the old jurist Q. Mucius Scaevola) we have a further point of distinction *nec paciscendo nec legem dicendo nec stipulando quisquam alteri cauere potest*. *Lex* is frequently used, both in lay writers (e.g. Plaut. *Most.* 352; *Trin.* 1162, &c.; Cic. *Att.* VI. 3. § 1; *Verr.* V. 70. § 180; Liv. XXXIII. 30. § 1; cf. Pernice *Labeo* I. p. 474) and legal, of the terms of a contract or disposition of property, especially as imposed by the owner or superior party. So *in mancipii lege dicere* (Cic. *Or.* I. 39. § 178); *ea lege mancipio dedit* (Gai. I. 140); *ea lege praedia locare* (ib. III. 145); *gladiatores ea lege tradere* (ib. 146); *hanc legem uenditionis* (D. XVIII. 1. 1 22); *ex lege donationis* (D. XL. 2. 1 16. § 1; Cod. VIII. 53. 1 9; 54. 1 2), and see D. VIII. 4. 1 13. pr. Originally the *lex* or *leges* were stated in the formal declaration (*nuncupatio*, Fest. p. 173) attending a mancipation, and would be distinguished from the previous bargain (*pactio*), which was thus carried into effect. After a time the covenants were made the subject of an attendant stipulation, the mancipation itself became more and more a form, and, as the contents were reduced to writing, the oral declaration was probably often abridged or omitted. The contents, except in case of difference between them (cf. D. VIII. 2. 1 35), might be referred to under the name either of *pactum* or *lex* (cf. D. II. 14. 1 7. § 5 *ea enim pacta insunt, quae legem contractui dant*).

? contract  
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(c) The creation of servitudes in connexion with the delivery of land is often spoken of e.g. *Haec lex traditionis 'stillicidia uti nunc sunt ut ita sint', hoc significat impositam vicinis necessitatem stillicidiorum recipiendorum* (D. VIII. 2. l 17. § 3). *Si quis duas aedes habeat et alteras tradat, potest legem traditioni dicere, ut vel istae quae non traduntur servae sint his quae traduntur, vel contra ut traditae retentis aedibus serviant* (ib. 4. l 6. pr.). *Cum essent mihi et tibi fundi duo communes Titianus et Seianus et in divisione convenisset, ut mihi Titianus, tibi Seianus, cederet, invicem partes eorum tradidimus, et in tradendo dictum est ut alteri per alterum aquam ducere liceret: recte esse servitutem impositam ait, maxime si pacto stipulatio subdita sit* (ib. 3. l 33. pr.). See l 32 below. It is however not improbable that in these passages Tribonian has substituted *traditio*, *tradendo* for *mancipatio*, *mancipando*. At least in Vat. Fr. 47 Paulus says a usufruct could not be reserved in making a delivery of a non-mancipable thing, because delivery was not an action of the civil law (Elders, p. 706 n.). And such a change from *mancipare* to *tradere* has actually been made in D. VII. 2. l 3. § 1, as may be seen on referring to the original in Vat. Fr. 80. A similar change would account for the generality of Gaius' statement, as given in D. II. 14. l 48 *In traditionibus rerum, quodcumque pactum sit, id valere manifestissimum est*.

(d) What then was the *pactio* and *stipulatio* which were used (where *in iure cessio* was not applicable) to create a usufruct or other servitude? We must distinguish two things: a bargain or stipulation to grant a servitude, and a bargain or stipulation actually granting it. It might easily occur that the precise limitations of the servitude required some investigation, but the general intention of the two parties could be at once expressed. This would be the subject of a *pactum*. If the parties or their representatives (sons or slaves) could meet, it might be confirmed by a stipulation. But such a bargain or stipulation would be preparatory to the formal constitution of the servitude; cf. D. VIII. 4. l 5. § 3a where the obligation to grant a servitude is expressly distinguished from the imposition and existence of a servitude; XLV. 1. l 136. § 1. Whether such a preparatory bargain or stipulation was made or not, the constituting act would apparently be a bargain, confirmed by a stipulation, in which the one party claimed and the other promised (according to the servitude in question) *uti frui sibi* (i.e. *stipulatori*) *licere*, or *ire agere sibi hereditate licere* (cf. D. XLV. 1. l 38 esp. §§ 10—12), with the limit of time, if any, and specification of the thing or piece of ground to be enjoyed or the direction of the road, or any other suitable limitations (D. VIII. 1. l 4; l 5; l 6. § 5; XLV. 1. l 115. pr., &c.). Or the form might be *neque per te* (i.e. *promissorem*) *neque per heredem tuum fieri, quominus mihi uti frui* (or *ire agere*, &c.) *recte liceat* (D. XLV. 1. l 49. §§ 1, 2; l 75. § 7. pr.). The former of these forms is apparently the more sweeping in its terms, but practically meant no more than the latter: a man could promise only for himself and his heirs, &c., not for all the world (D. XLV. 1. l 38. pr.). It was usual however to

add another clause providing for the payment by the promiser (i.e. the grantor of the servitude) of a sum of money in case the stipulator (i.e. the grantee) was disturbed in his enjoyment (*si aduersus id factum sit*, ib. l 71; l 137. § 7). What liability would thus be incurred by the promiser, would of course depend on the terms in which the condition of forfeiture was couched. In Théophil. *Inst.* II. 3. § 4 agreement, confirmatory stipulation, and penal clause all appear in the form described.

**id efficere**] ‘effect the establishment of a usufruct’.

§ 1. **consistit**] So the inferior MSS. F has *constitit*; Steph. *συνίσταται*. The same mistake occurs in D. XIX. 2. l 2. pr. (Gaius), *Locatio et conductio proxima est emptioni et uenditioni, iisdemque iuris regulis constitit* (Justinian’s transcript of this, *Inst.* III. 24. pr., has *consistunt*, and Gai. III. § 142 has *locatio et conductio similibus regulis constituuntur*); XIII. 6. l 1. § 2 *impuberes commodati actione non tenentur, quia nec constitit commodatum in pupilli persona sine tutoris auctoritate*; XXXVIII. 1. l 9. § 1. *Constitit* may be right in D. VIII. 3. l 13. § 1 and XLIV. 7. l 52. § 8 (but cf. § 10). Below § 3 *constitit* is in F for *constituitur*.

For the meaning, ‘has legal footing’, or ‘existence’, ‘lies’, ‘is admissible’, cf. D. VIII. 2. l 20. pr. *seruitutes, quae in superficie consistunt, possessione retinentur*; XXXII. l 40. pr. *cum in parte hereditatis fideicommissum non constitit*; Gai. III. § 131 *in arcariis nominibus rei, non litterarum, obligatio consistit*. In some passages the meaning is rather ‘consists’ e.g. D. I. 2. l 2. § 12 *est proprium ius ciuile, quod sine scripto in sola prudentium interpretatione consistit*; L. 17. l 24 *quatenus cuius intersit, in facto, non in iure consistit*. Compare VII. 5. l 5. § 1 *si pecuniae sit ususfructus legatus uel aliarum rerum quae in abusu consistunt* (‘allow of consumption’).

**in fundo et aedibus**] ‘in a landed estate and a town house’. *Fundus* is any land (*omne quicquid solo tenetur*, D. L. 16. l 115) which is regarded as a whole, whether small or large, or hitherto part of a larger *fundus*. It has boundaries, a mere *locus* has not. See Ulpian in D. L. 16. l 60. It may or may not be built on, and either wholly or partly (ib. l 211).

*aedes* was the ordinary expression for a dwelling-house (D. XXX. l 41. § 8) in a town as distinguished from *villa* ‘a country house’, ‘homestead’ (D. L. 16. l 211).

**iumentis**] ‘beasts of draught’ (for *iug-mentum* ‘a yoke beast’) i.e. horses, asses, mules. Oxen are not properly comprehended under this term, but they are under *pecus* (D. XXI. 1. l 38. §§ 4—6; XXXII. l 65. § 5) or *armenta* ‘plough beasts’ (D. L. 16. l 89. pr.; see below note on l 68. § 2). *Pecus* (with stems *pecud-* and *pecor-*) comprehended *quadrupes quae gregatim pascuntur*, viz. sheep, goats, oxen, horses, mules, asses and swine (D. IX. 2. l 2. § 2; XIX. 5. l 14. § 3; XXXII. l 65. § 4; Vat. Fr. 259: comp. Ulp. XIX. 1).

**ceterisque rebus**] ‘and other things’, i.e. besides slaves and yoke-beasts. Slaves are included, according to the context, under *personae* (Gai. I. 48, *quaedam personae sui iuris sunt, quaedam alieno iuri subiectae sunt*) &c., or

under *res* (Gai. II. 260, *potest quisque etiam res singulas per fideicommissum relinquere, uelut fundum, hominem, uestem, argentum, pecuniam*).

§ 2. in uniuersum] Used either extensively, of the whole number of cases of ownership, i.e. 'generally', 'universally' as Liv. IX. 26. § 8 *non nominatim qui Capuae, sed in uniuersum qui usquam coissent coniuirassentue aduersus rempublicam, quaeri senatus iussit*; D. XLIV. 4. l 11. § 1 *in uniuersum autem haec in ea re regula sequenda est, ut dolus omnimodo puniatur*: or intensively, of the whole character and life of an ownership, i.e. 'entirely'; Gai. III. 103, *quaesitum est, si quis sibi et ei, cuius iuri subiectus non est, dari stipuletur, in quantum ualeat stipulatio: nostri praeceptores putant in uniuersum ualere* (for the whole amount); Tac. Germ. 5 *terra etsi aliquanto specie differt, in uniuersum tamen aut siluis horrida aut paludibus foeda* ('as a whole', 'speaking generally').

**proprietates**] *Proprietas* 'ownership', 'property', is opposed sometimes to *possessio*, e.g. D. IV. 3. l 33; L. 16. l 115; frequently, as here, to usufruct, e.g. Gai. II. 30.

**semper abscedente u. f.**] 'in consequence of the perpetual withdrawal of the use and enjoyment', cf. l 56. *Abscedere* is the opposite of *accedere*: the former denotes the loss of what belongs to a thing; the latter the addition to it from without of what did not belong to it. The ownership, when another has the usufruct, is often called *nuda proprietas*, cf. l 72.

**placuit**] 'it has been determined', i.e. by legal authority, without implying by what authority. *Placere* is the regular word in a decree of the senate, e.g. Cic. Phil. 3. § 39; 5. § 33, &c.; so of a judicial decree, *postea sententia dicta est, et placuit id...ei deberi* (D. XXXI. l 88. pr.); of lawyers' opinions, *sed quod de sponsore diximus non constat; nam diuersae scholae auctoribus placuit, nihil ad nouationem proficere sponsoris adiectionem aut detractorem* (Gai. III. 178); ib. II. 154, 178, &c.; of a decision of the emperor (D. XXXI. l 66. pr.); of a private agreement (D. XX. 1. l 1. § 3).

**certis modis extingui**] See title 4 of this book, and Just. II. 4. § 3. The modes by which a usufruct perishes are:

(1) Death of the usufructuary (D. VII. 4. l 3. § 3), or, if a community be the usufructuary, either its extinction (ib. l 21) or expiration of 100 years (VII. 1. l 56), whichever event happen first.

(2) *Capitis deminutio* of the usufructuary (D. VII. 4. l 1) confined by Justinian to *capitis deminutio maxima* and *media*, i.e. to loss of freedom or citizenship. (Cod. III. 33. l 16. § 2.) See note on l 25. § 2.

*destruction* (3) *Distinction*, or total permanent change, of the object of the usufruct (L. l 5. § 2—l 12).

(4) Non-use [see below, l 5 (where see note, p. 44); l 71].

(5) Confusion or consolidation with the ownership, i.e. if the owner acquire the usufruct (e.g. by surrender from the usufructuary Gai. II. 30), or if the usufructuary acquire the ownership (D. VII. 4. ll 16, 17).

Of course a usufruct, like any other right or privilege, if granted only for a time, or till a specified event, or by a person who has only a similarly



limited right to grant, comes to an end on the arrival of the time or event in question. Paulus (*Sent.* III. 6. § 28 sqq.) applies the term *amittitur ususfructus* to Nos. 2—5, and *finitur ususfr.* to death and expiration by lapse of time.

**extingui et ad propr. reuerti]** The two expressions are strictly speaking inconsistent. The former is really the most exact. The usufruct held by the usufructuary is a right of enjoyment attached to his person. On his death or loss either of freedom or of citizenship, or on failing to use, this right is extinguished and is nowhere at all. The owner of the land does not receive back the usufruct, but is no longer hindered in the exercise of his full rights as owner by another having a right to use and enjoy his land. So D. XXIII. 3. 1 78. pr. *cum in fundo mariti habens mulier usumfructum dotis causa eum marito dedit, quamvis ab ea ususfructus decesserit, maritus tamen non usumfructum habet, sed suo fundo quasi dominus utitur, consecutus per dotem plenam fundi proprietatem, non separatam usufructu*, (cf. Böcking *Pand.* § 134, Bd. II. pp. 10, 11). The return of the absent usufruct to the ownership is however a practical way of putting the matter, and is frequent, cf. D. VI. 1. 1 33; XLIII. 16. 1 10.

**§ 3. et constituitur]** So the inferior mss.: F and the first hand of a Leipsic ms. have *constitit*; Steph. supports our reading: *οἱστίσι τρόποις καὶ συνίσταται καὶ σβέννυται ὁ οὐσφόρουκτος, τοῖς αὐτοῖς καὶ ὁσος συνίσταται τε καὶ σβέννυται*. Cf. also Just. II. 5. pr.: and below, 1 6. The perfect *constitit*, followed by the present *finitur*, does not seem suitable. *Consistit* would be a possible correction.

**nudus usus]** i.e. use without produce. See 7. 1 1 (Gai.) *constituitur etiam nudus usus, id est, sine fructu: qui et ipse isdem modis constitui solet quibus et ususfructus*; ib. 1 14. § 1 *ususfructus an fructus legetur, nihil interest: nam fructui et usus inest, usui fructus deest: et fructus quidem sine usu esse non potest, usus sine fructu potest*.

The lawyers had some difficulty in defining what the use without the *fructus* consisted of. The result of their discussions was that the (bare) use of a house was held to be the right of dwelling there with a person's family and dependents: the use of a country estate (*fundus*) carried besides this the right of consumption for daily use of the ordinary products, such as vegetables, fruit, flowers, wood, hay and perhaps also wine and oil; the use of cattle carried only the dung, though some thought a little milk was included: the use of a slave carried his services for the user and his family. But in no case could the user of a house, unless he resided in it also, grant or let to others the use. And in the case of a country estate the use must not interfere with the regular operations of the farmer. See title 8, and the abridged account, not in all respects consistent with it, in Just. II. 5.

**1 4. in multis casibus]** Just as we say 'in many cases'. Cf. D. I. 1 37, *inspiciendum est quo iure ciuitas retro in eiusmodi casibus usa fuisset*, and below, 1 33. § 1; 1 64.

**pars dominii est et exstat]** 'is part of the ownership and appears

separately'. The position of a usufructuary in comparison with the owner's position is peculiar, and naturally gave rise to different modes of expression according to the circumstances. A usufructuary had the exclusive possession (physically) of the thing and the exclusive right to take and consume its produce. These were rights of ownership exerciseable by him or his nominees, and the owner could no longer exercise them. Hence the grant of a usufruct might be considered as the severance from the ownership of those rights, and thus we get such expressions as *deducto usufructo proprietas legari potest* (cf. l 6. § 2, &c.), and *ususfructus amissus ad proprietatem recurrit* (Paul. Sent. III. 6. § 28). In some lights therefore a usufruct (a) may be called a part of the ownership (as here and cf. D. XXXI. 1 76. § 2 (Papin.) *fructus portionis instar optinet*): and (b) in some matters is treated as such; e.g. a bargain not to sue for an estate was a good plea to an action on the same title for the usufruct (D. II. 14. 1 27. § 8); a stipulation for an estate included the usufruct of the estate (*similis est ei qui totum, deinde partem stipulatur*, XLV. 1. 1 58); one bound to make over an estate could give a surety bound only for the usufruct (XLVI. 1. 1 70. § 2); a bequest of an estate could be diminished by the usufruct being withdrawn (XXXIII. 4. 1 2. § 1); in all which cases the analogy of a part, not of a servitude, is followed: and (c) the usufructuary was sometimes included under the term *dominus* (XLII. 5. 1 8. pr.). On the other hand a usufructuary was in other respects very different from an owner: he had not the legal possession; he had no power of consuming the substance, nor of creating servitudes, nor of alienating his right, nor even of transmitting it to his heir. The owner had all these rights, as well as those exerciseable by the fructuary, inherent in his ownership, and only partially and temporarily dormant in consequence of the grant made to a stranger of the use and produce. And therefore in many respects usufruct was not part of the ownership. Thus (a) l 33 (Papin.) *usumfructum in quibusdam casibus non partis effectum optinere convenit*; XXXI. 1 66. § 6 (Papin.) *ususfructus in iure, non in parte, consistit*; L. 16. 1 25. pr. (Paul.) *recte dicimus eum fundum totum nostrum esse, etiam cum ususfructus alienus est, quia ususfructus non domini pars sed servitus (servitutis F.) sit, ut via et iter; nec falso dici totum meum esse, cuius non potest ulla pars dici alterius esse*; and (b) a formal release of the usufruct by one to whom the estate itself was due was invalid, because the usufruct was not a part (D. XLVI. 4. 1 13. § 2); and (c) the usufructuary was constantly opposed to the *dominus*, and sometimes expressly excluded from the name (XXIX. 5. 1 1. § 2; XLVII. 2. 1 43. § 12). Gaius states and does not decide the question whether *ususfructus pars rei sit an proprium quiddam* (D. XLVI. 1. 1 70. § 2). See Cujac. in lib. XVII. *Quaest. Papin. ad l 33. h. t. usumfructum*; Böcking Pand. § 134. n. 24 (vol. II. p. 10); Windscheid Pand. § 200.

**exstat]** This word has occasioned much trouble. Brisson, Dirksen, Heumann and the German translator all take it as equivalent to *constat*. Cujac. refers to D. VII. 2. § 3 as giving the same context with *constat*:

*posse enim usumfructum ex die legari et in diem constare.* Fuchs (*Krit. Stud.* p. 21) proposes to substitute *constat* in the text. Steph. also seems to have taken it so. ἐπὶ πολλῶν ὁ οὐσούφρουκτος μέρος δεσποτείας γνωρίζεται, καὶ τοῦτο ἐντεῦθεν δέικνται τε καὶ δηλοῦται, ὅτι, ὥσπερ ἡ δεσπότης καὶ πούρως (pure) καὶ ὑπὸ ἡμέραν δύναται δίδοσθαι, τὸν αὐτὸν τρόπον καὶ ὁ οὐσούφρουκτος δύναται καὶ πούρως καὶ ἀπὸ φανερᾶς ἡμέρας συνίστασθαι (though it is possible that γνωρίζεται 'is recognised as separate' may be meant for *exstat*). But there is no other instance of *exstat*=*constat* 'it is certain', and the construction after *constat* is an accusative with infinitive (e.g. D. IX. 4. 1 21. § 1; XXIV. 3. 1 24. pr. § 5; XXVI. 5. 1 5; 7. 1 9. § 8; XLI. 3. 1 44. § 1) not *quod*. It would be grammatical, but would involve an unusual sense of *exstat*, if we translated: 'it is a striking fact, that it can be given either immediately or from a future time'. I think the ordinary meaning of *exstat* may be given to it here: 'is to the fore', is to be found, 'is not merged and undiscoverable'; cf. D. XLII. 6. 1 1. § 12 *sciendum est, posteaquam bona hereditaria bonis heredis mixta sunt, non posse impetrari separationem: confusis enim bonis et unitis separatio impetrari non poterit. Quid ergo si praedia extant, uel mancipia uel pecora uel aliud quod separari potest? hic utique impetrari poterit separatio*, XIII. 7. 1 22. § 2, *a praedone fructus et vindicari extantes possunt et consumpti condici*; and below 9. 1 1; IX. 4. 1 21. § 5. Or it may mean 'comes to the fore', 'comes to be', e.g. XII. 6. 1 18 *si ea condicione debetur, quae omnimodo exstatuta est*; XXXIII. 4. 1 11; XXXV. 2. 1 48 *cum emptor uenditori heres exstitit*.

The main difficulty in this way of taking the passage lies in the insufficiency of the reason appended by Paulus (*quod uel*, &c.). But I assume that the passage of Paulus has been altered (see next note), and that we have only part of his reasoning. It would improve the text if *est et* were struck out as a misreading of *exstat*.

**uel praesens uel ex die dari potest]** 'It can be given so as to take effect either immediately or from a future day.' In the Vatican fragments (§ 48—50) we have extracts from Paulus' *Manualia*, where he says that a usufruct from a future day could be established by bequest (see *infr.* 1 54; 1 72) but that whether it could be established by surrender in court or mancipation or adjudication was very doubtful. Probably Tribonian has altered our passage, which naturally would have contained some such doubts. (So also Huschke on Vat. Fr. l. c.)

15. A usufruct is divisible, and this is shewn in five instances. It may be created in part; may be lost in part; may be reduced by the operation of the *lex Falcidia*, which assigned the heir a fourth part; the obligation to grant it devolves upon the heirs of the promiser according to their respective shares in the promiser's inheritance; and a part-owner of an estate is liable to the usufructuary only in proportion to his share in the estate. Cf. Cujac. *ad loc.* (IV. p. 760).

**et]** The first *et* belongs to *constitui* and corresponds to the second *et* which belongs to *amitti*.



**ab initio**] ‘originally’, ‘at the creation of the usufruct’, as opposed to any subsequent modification. So D. XVI. 3. 1 24 (Papin.); XXXV. 2. 1 51; 1 73. § 5; &c. Cf. infr. 1. 26. In D. XLIX. 1. 1 19, it means ‘anew’; in D. XXVIII. 6. 1 43. § 2; XXXV. 2. 1 1. § 8, ‘at the commencement’ of the words of institution or bequest. Gaius often has *statim ab initio* in our sense. II. 123; 148; IV. 172; 173, and D. XXXV. 2. 1 76. § 1; 1 78, &c.

**pro parte indiuisa uel diuisa**] ‘in undivided or in divided parts of a thing’, or, as it is sometimes said ‘in ideal or material parts’; i.e. a usufruct may be divided between several persons; e.g. A to have  $\frac{1}{2}$ , B to have  $\frac{1}{3}$ ; C to have  $\frac{1}{6}$ ; or A may have the (whole) usufruct in that part of an estate which lies on the right bank of the river; B the (whole) usufruct on the part lying on the left bank. The same contrast of different modes of division is referred to in D. VII. 4. 1 25, *placet uel certae partis uel pro indiuiso usumfructum non utendo omitti*; XXXI. 1 66. § 2 *plures in uno fundo dominium iuris intellectu, non diuisione corporis optinent*; XLV. 3. 1 5. pr. *seruus communis sic omnium est non quasi singulorum totus, sed pro partibus utique indiuisis, ut intellectu magis partes habeant quam corpore*; I. 16. 1 25. § 1 Q. *Mucius ait partis appellatione rem pro indiuiso significari: nam quod pro diuiso nostrum sit, id non partem sed totum esse: Seruius non ineleganter partis appellatione utrumque significari*; XIII. 6. 1 5 fin. For examples of divided usufruct see 1 49; 2. 1 1; 1 4, &c. A real servitude was not itself divisible, though there might be a servitude to or in a definite part of an estate: *Per partes seruitus imponi non potest, sed nec adquiri. Plane si diuisit fundum regionibus, et sic partem tradidit pro diuiso, potest alterutri seruitutem imponere, quia non est pars fundi sed fundus* (D. VIII. 4. 1 6. § 1; cf. 3. 1 32; 1. 1 6; 1 17). The contrast between usufruct and other servitudes is seen in the case of a formal release (*acceptilatio*) of part of the one and of the other. The release of part of a usufruct was valid; of part of a right of road was null (D. XLVI. 4. 1 13. § 1, cf. XXXV. 2. 1 80. § 1; 1 81). A use could not be divided, *nam frui quidem per parte possumus, uti pro parte non possumus* (D. VII. 8. 1 19).

**legitimo tempore amitti**] ‘to be lost in (i.e. by non-use for) the statutable period’, e.g. by not taking his share of the fruits, or by not taking the fruits from his part of the estate. Paul. Sent. III. 6. § 30 *non utendo amittitur usufructus, si possessione fundi biennio fructuarius non utatur, uel rei mobilis anno*. These short periods were enlarged by Justinian, and the distinction between moveables and immoveables abolished, the same period being required to give a plea of prescription against a claim of usufruct, as was required to give a plea against a claim of ownership (Cod. III. 33. 1 16. § 1). This period was ten years *inter praesentes*, i.e. if claimant and possessor were domiciled in the same province; twenty years *inter absentes*, i.e. if they were domiciled in different provinces (Cod. III. 34. 1 13; VII. 33. 1 12). In the case of absence

for part of the ten years, the number of years of absence had to be added to the ten years; i.e. if a man was domiciled in the same province for only six years, the period required would be  $10 + (10 - 6)$ , i.e. 14 years (Justin. *Nov.* 119. § 8). The three years' period prescribed for acquiring the *ownership* of moveables (Cod. vii. 31. § 2) did not apply to the loss of servitudes; cf. Unterholzner *Verführungslehre*, § 223.

**similiter]** i.e. *pro parte indivisa uel divisa*. So also *eadem ratione*.

**per legem Falcidiam]** The *lex Falcidia* was proposed by Pub. Falcidius trib. pl. 714 A.U.C. (Dion Cass. XLVIII. 33). It was intended to prevent the property of an inheritance being so given away in legacies that the heir would be unwilling to enter. It declared that every Roman citizen might give what legacies he willed and to whom he willed, but with this proviso, that at least a fourth of the whole of this inheritance should be taken by the heirs under the will (Gai. ii. 227; D. xxxv. 2. 11). The value of the estate was taken as it stood at the time of the death. Any accretions or losses between that time and the time of entry were not reckoned; they were an additional benefit or burden to the heir only (l. 30; l. 73). If the total amount of the legacies exceeded in value three-fourths of the inheritance, all legatees had to abate proportionally. The heir could make the abatement on paying the legacy, or, if there was uncertainty whether any, and if so what, abatement would be required, he could pay the legacies in full, taking security for repayment of the excess (3. 11. pr.). Anything the heir received otherwise than as heir was not regarded in computing the fourth. Thus a legacy under the will to the heir, or anything paid him by a legatee as the condition of his being entitled to the legacy, or by a slave as the condition of obtaining his freedom, was not reckoned in the heir's fourth (l. 76; l. 91). If there were several heirs, the legacies charged on each heir's share had to be reduced so as to leave him a fourth at least, (not of the inheritance but) of his share of the inheritance: and an heir who was not charged with any legacies did not have his share diminished in consequence of other heirs being overcharged (l. 77). The value of the inheritance was usually estimated by an arbiter (3. 11. § 6); moderate funeral expenses, all debts, and the value of all slaves manumitted by the will, were deducted from the value of the inheritance before the fourth was calculated (2. 11. § 19; *Inst.* ii. 22. § 3). The provisions of the *lex Falcidia* were extended to trusts by the *Sc. Pegasianum* (Gai. ii. 254), and to trusts on an intestacy by Antoninus Pius (l. 18. pr.); and was applied in practice to gifts in view of death (*mortis causa donationes*, xxxix. 6. 127).

If a usufruct of some property was bequeathed and in consequence of the *lex Falcidia* an abatement had to take place, a fourth of the usufruct was retained by the heir (D. xxxv. 2. 11. § 9). But in order to ascertain the total value of the legacies a valuation had to be made. A

scale shewing, according to the age of the usufructuary, a certain number of years' purchase was given by Ulpian; a somewhat different scale was stated by Macer to be in use (ib. 168; see below note on l 29), and apparently the abatement required by the lex Falcidia was sometimes made by the heir receiving from the legatee a fourth of the value so estimated (cf. ib. l 1. § 9; l 80. § 1; l 81). See below, note on *sociis* p. 47.

**reus promittendi]** *Qui stipulatur, reus stipulandi dicitur; qui promittit, reus promittendi habetur* (D. XLV. 2. l 1). The older form had the ablative (*reus stipulando*). Festus, p. 273, has *Reus nunc dicitur qui causam dicit, et item qui quid promisit spondenditue ac debet; at Gallus Aelius, libro II. significationum uerborum quae ad ius pertinent, ait, reus est qui cum altero litem contestatam habet, siue is egit siue cum eo actum est. Reus stipulando est idem qui stipulator dicitur, quippe suo nomine ab altero quid stipulatus est: non is qui alteri adstipulatus est. Reus promittendo est, qui suo nomine alteri quid promisit, (non) qui pro altero quid promisit*. Festus adds, though the precise words are not certain, that in the second of the XII. tables (*si quid horum fuit uitium, iudici arbitro reoue eo dies diffensus esto*) the word is used both of plaintiff and defendant. It does not seem necessary there to refer it to more than the defendant, though practice may have extended the application of the law. Cicero says, *Orat. II. 43. § 183, reos appello non eos modo qui arguuntur, sed omnis quorum de re disceptatur: sic enim olim loquebantur: and § 321, reos appello quorum res est*. As a matter of fact, however, except in the phrases *reus stipulandi* and *reus satis accipiendi* (D. XLVI. 3. l 34. § 8) the word always means the person charged or liable either for a criminal offence (so commonly in lay writers), or for a civil obligation, e.g. for a dowry (D. XXIII. 3. l 5. § 7; XXIV. 3. l 22. § 2), for money borrowed (XVI. 1. l 17. § 2); or for a religious obligation, as a vow (Verg. *Aen. v. 237*, cf. Cic. *Legg. II. 16. § 41*); or metaphorically, e.g. *fortunae* (Liv. VI. 24. § 8); *suae quisque partis tutandae* (Liv. XXV. 30. § 5); *desidia* (Martial x. 7. 2), &c. In law the *reus* was the principal debtor, as distinguished from those collaterally concerned (cf. D. XLV. 2. l 6. § 3; XIII. 7. l 9. § 3, &c.). The application of the term to *stipulatores* was probably due to the convenience of lawyers, who wanted a brief term to distinguish a *stipulator* from an *adstipulator* (cf. Festus above; Gai. II. 110 sqq.), rather than to any lingering sense of the term being equally applicable (if indeed it ever was) to both parties to an obligation.

**usus fr. obligatio diuiditur]** 'the obligation of allowing the usufruct is divided'. The case is taken of a person who had granted a usufruct by stipulation and had died: his heirs are bound to allow the grantee to have the usufruct: and a usufruct being divisible, each heir is bound to allow it so far as his share of the inheritance goes. The principle is the same, whatever be the thing in which the usufruct was granted, whether it was the whole estate of the deceased, or an undivided part of it, or a specific farm or slave or article, &c. If the obligation were not thrown



upon several persons by inheritance, but assumed by their own promise, each would be liable for the whole, unless the contrary were expressed (D. XLV. 2. 1 2; 1 3. § 1).

In the case of non-divisible servitudes each heir is bound for the whole. *Ea, quae in partes diuidi non possunt, solida a singulis heredibus debentur* (D. L. 17. 1 192: cf. x. 2. 1 25. § 10; xxxv. 2. 1 80. § 1).

**si ex communi praedio debeatur**] ‘if the usufruct be due from an estate (i.e. if the usufruct is the usufruct of an estate), held in common by several persons’.

**socii**] ‘part-proprietors’. *Socius* is used sometimes in a wider sense, as here, of persons who hold property in common without any intention of forming a partnership in it, e.g. as heirs or legatees or donees in common: and sometimes in a narrower sense of those who intend to hold it on joint account (D. XVII. 2. 1 31—37; x. 3. 1 2). In either case the action of one does not make the others liable to third parties, though they may be liable to contribution *inter se*. If an action be brought against one to enforce the usufruct, judgment against him affects only his share of the property.

A usufruct may be divided in several ways, either (1) by dividing the land into districts according to the shares (*ut regionibus eis uti frui (iudex) permittat*); or (2) by letting the land either to one of the usufructuaries or to a third party, and dividing the rent: or (3) if the thing concerned be a moveable, by arranging for a deposit of it with the usufructuaries in turns (D. x. 3. 1 7. § 10).

**restitutio**] *Restituere, restitutio* are constantly used in law language, not only of restoration to a claimant of what he had before, but of giving up to him what he had a right to have. The fact of his claim being approved by the law shews that he is *out* of what is due to him, and restoration or replacement become therefore suitable expressions. *Restituere is uidetur, qui id restituit, quod habiturus esset actor si controuersia ei facta non esset* (D. L. 16. 1 75; cf. 1 22; 1 35; 1 73; 1 81; 1 246; VI. 1. 1 13; 1 17; 1 20, &c.; Cic. *Caecin.* 8 § 23). So it is even used of the duty of a vendor (D. XIX. 1. 1 13. § 18); of a purchaser (Cod. IV. 49. 1 8. § 1); of one who has received damages for the corruption of his slave (D. XI. 3. 1 14. § 9); of an agent (XVII. 1. 1 8. §§ 9, 10); Savigny, *System.* § 222; Bd. v. p. 129. It is regularly used of an heir or legatee delivering property under a trust to the intended holder (*infr.* 1 50; Gai. II. 248 sqq.; D. XXXIII. 2. 1 29, &c.); and of restoration of rights of minors, absentees, and others, quasi-legally but unjustly lost—*restitutio in integrum* (D. IV. 1—6; XLII. 8). Similarly of Metellus’ action on succeeding Verres in Sicily (*Verr.* II. 26). In a more literal sense it is used of restoring roads, buildings, &c. (D. XLIII. 8. 1 2. § 43; 12. 1 1. § 19; VII. 4. 1 10. § 7, &c.).

16. pr. **ut ecce**] ‘as for instance’. So Gai. I. 193; D. IV. 5. 1 7. pr.; XIV. 1. 1 1. § 12, &c. Originally no doubt Gaius mentioned here the mode of creating a usufruct by surrender in court (Gai. II. 30).

**sed et proprietas]** A second way of creating a usufruct, and the reverse of the first. There the usufruct is bequeathed, and the bare ownership remains in the inheritance: here the bare ownership is bequeathed, and the usufruct remains.

**deducto usu fructu]** ‘withdrawing’ or ‘reserving the usufruct’. Vat. Fr. 47 (Paulus) *Per mancipationem deduci ususfructus potest, non etiam transferri. Per ‘do lego’ legatum et per in iure cessionem et deduci et dari potest.* 48 *In re nec Mancipi per traditionem deduci ususfructus non potest, nec in homine, si peregrino tradatur: civili enim actione constitui potest, non traditione quae iuris gentium est.* Cf. Gai. II. 33, and 1 32 below; and the note on 1 3 *et sine testamento* (p. 35).

It was essential that the reservation of the usufruct should be expressed, if the bare ownership was intended to be bequeathed. A legacy of a fundus to one and of the usufruct of the fundus to another made the two hold the usufruct jointly (D. XXXIII. 2. 1 19). But this was not the effect of a similar adjudication in a suit *familiae erciscundae* (x. 2. 1 16. § 1), evidently because the intention of the judge in such a case was to put an end to the joint holding (so also Donell. *Iur. Civ.* x. 6. 5).

§ 1. **adhuc]** ‘moreover’. So Gai. III. 102 (where *adhuc* is evidently parallel to *item, praeterea, rursum*); 150; 180 (parallel to *praeterea, &c.*).

**iudicio fam. erc.]** This proceeding is usually called *iudicium*, only occasionally (and improperly?) *actio* (D. x. 1. 1 1; 1 2. pr.; Cod. III. 36. 1 2). The reason is apparently given in D. x. 2. 1 2. § 3 *In familiae erciscundae iudicio unusquisque heredum et rei et actoris partes sustinet.*

**familiae]** (a) *Familia* is a body of *famuli*, and this according to Festus is from an Oscan word *famel* meaning ‘slave’. The ‘family’ of an ancient Roman consisted of his wife, children and slaves, who were all *in sua potestate*, i.e. under his control and at his disposal. In the course of time this original meaning split as it were into two parts, and thus the ordinary meanings of the word in classical writers are (1) the family or group of persons sprung from one stock and bearing the same name (e.g. Cic. *Mur.* 7. § 15 *sunt amplae et honestae familiae plebeiae*; Tac. *H.* I. 16 *sub Tiberio et Gaio et Claudio unius familiae quasi hereditas fuimus*; and see Ulpian’s definition D. L. 16. 1 195. § 2 *communi iure familiam dicimus omnium adgnatorum: nam et si patre familias mortuo singuli singulas familias habent, tamen omnes, qui sub unius potestate fuerunt, recte eiusdem familiae appellabuntur, qui ex eadem domo et gente proditi sunt*): and (2) a body of slaves (e.g. Cic. *Caccin.* 19. § 35 where commenting on the edict *unde hi aut familia aut procurator tuus* he says *non dubium est quin familiam intelligamus quae constet ex servis pluribus, quin unus homo familia non sit*; Varr. *R. R.* I. 18. § 1 *de familia: Cato dicit haec mancipia XIII habenda*; Ulp. XLIII. 16. 1 1. § 16 sqq. The *familia publicanorum* included all servants, whether slave or free, D. XXXIX. 4. 1 1. § 5). But the earlier meaning of a whole ‘household’ is seen in the words *pater familias, mater familias, filius familias*, and in old formulae. The word occurs several times in

quotations from the XII. tables. Putting the most important together we have *Paterfamilias uti super familia pecuniaue* (i.e. persons or cattle) *sua legauerit, ita ius esto* (Cornif. I. 13: Ulpian XI. 14 gives *uti legassit super pecunia tutelaue suae rei, ita ius esto*). *Si intestato moritur, cui suus heres nec escit, adgnatus proximus familiam habeto. Si adgnatus nec escit, gentiles familiam habento* (Bruns p. 23, ed. 4; Schöll *Duod. tab. rell.* p. 127 sqq.). The *Lex Valeria Horatia* had *qui tribunis plebis, aedilibus, iudicibus, decemviris nocuisset, eius caput Ioui sacrum esset, familia ad aedem Cereris ueniret* (Liv. III. 55. § 7). So also Liv. XLV. 40. § 7 *e filiis quos solos nominis sacrorum familiaeque heredes retinuerat domi*, probably from an old formula (Pernice *Labeo* I. p. 325). The power of disposition over the household was exercised by means of a mancipation (Gai. I. 117, 118), and this was used in one of the early forms of will; Gai. II. 103, 104 *olim familiae emptor, id est, qui a testatore familiam accipiebat mancipio, heredis locum optinebat, et ob id ei mandabat testator, quid cuique post mortem suam dari uellet: nunc uero alius heres testamento instituitur, a quo etiam legata relinquuntur, alius dicis gratia* ('for form's sake') *propter ueteris iuris imitationem familiae emptor adhibetur. Eaque res ita agitur: qui facit (testamentum), adhibitis sicut in ceteris mancipationibus v testibus ciuibus Romanis puberibus et libripende, postquam tabulas testamenti scripserit, mancipat alicui dicis gratia familiam suam: in qua re his uerbis familiae emptor utitur, 'familia pecuniaque tua endo mandatela tua custodelaque mea* (so Mommsen), *quo tu iure testamentum facere possis secundum legem publicam, hoc aere', et ut quidam adiciunt, 'aeneaque libra, esto mihi empti': deinde aere percipit libram, idque aes dat testatori uelut pretii loco, &c.* Cf. Ulpian XX. §§ 2—9. Gaius also speaks of *uendere familiam* (II. 109), *familiam uenire* (II. 116, 119). The household included not merely the persons but also the family stock of property, and eventually was used for the property (i.e. slaves and things), exclusive of the free persons. In D. XXXVI. 1. 1 15. § 7—1 17. pr. the following expressions are given as all denoting in a testamentary disposition the whole of a person's estate, *hereditas, bona, familia, pecunia, uniuersa res mea, omnia mea, patrimonium, facultates, quidquid habeo, census meus, fortunae meae, substantia mea, peculium meum, successio*. In the Bantine inscription (Bruns p. 51) and Cato ap. Gell. VI. (VII.) 3. § 37 *minus dimidium familiae multa esto*, it means 'property'. On the word generally see Ulpian in D. I. 16. 1 195.

(b) In the *iudicium fam. erc.*, at least as we know it, the 'household' was only the property (*res familiaris*). It was a proceeding for dividing among coheirs (whether by will or intestacy), or others *heredum loco* (D. X. 2. 1 2. pr.; 1 24. § 1), all the *res hereditariae*, that is, the slaves, land or moveables belonging to the inheritance. Moneys due to or from the deceased were *ipso facto* divided among the heirs in their respective shares, and hence (by the XII. tables) did not come properly into the proceeding (1 2. § 5—1 4; Cod. II. 3. 1 6; III. 36. 1 6), though arrangements were sometimes made or confirmed respecting them (ib.). But it was the duty of



the judge to make a complete division (D. x. 2. l 24. § 20) and to settle all claims that the heirs might have against one another for legacies or dowries, or for expenses or liabilities incurred, or for profits accrued in respect of the inheritance or of anything belonging to it (D. x. 2 *passim*). He might divide the property in physical parts, or sell it and divide the proceeds (l 22. §§ 1, 2); he might distribute the several things among the heirs and direct one to pay to the other the excess value (l 52. § 2); or impose a servitude in favour of one on property assigned to another (l 22. § 3; x. 3. l 18). Such a servitude might be a usufruct, which is the case named in our text. If the testator had bequeathed some land and reserved the usufruct to his heirs, or if he had bequeathed a usufruct to a slave belonging to the inheritance, the judge might, if the heirs wished not to hold the usufruct in common, assign it to one absolutely or for a time or in alternate years (l 16. pr. § 2). The judge is often called *arbiter* (l 30; l 31; l 43; l 47, &c.; Paul. *Sent.* i. 18. § 1; Cic. *Caecin.* 7. § 19).

**erciscundae]** This word, like some others in Latin, was written and probably pronounced variously, with and without the aspirate. The oldest authority the *Lex Rubria* (A. U. C. 705—712) has *de familia erciscunda deiuidunda iudicium* (C. I. L. i. 205, 55; Bruns, p. 95). The MSS. of Cicero (*Or.* i. 56. § 237; *Caecin.* 7. § 19) mainly support *herciscundae*. Gaius (ii. 219; iv. 42) omits *h*. In D. x. 2, the first writer of the Florentine ms. generally omits *h*, which the corrector generally restores; the early Neapolitan palimpsest always omits *h*. Festus p. 82 and Servius (*Aen.* viii. 642) write *erctum*. The origin of the word is obscure. The addition of *deiuidunda* in Rubrius' law has led Corssen (*Beitr. Ital. Spr.* p. 113 sq.) to assign to the word a different meaning from 'dividing' and he suggests 'marking off', and connects the root with that of *hortus* and *cohors*. Puntchart (*Civilrecht* p. 167) connects it with *ἐργεῖν* and takes it as originally 'inclose', then 'mark off', 'divide'. Gaius however (ii. 219) expressly interprets *erciscunda* as *diuidunda*, and Rubrius may well have meant the same by the addition. In Cic. *Or.* i. 56. § 237 *qui quibus uerbis herctum cieri oporteat nescit, idem herciscundae familiae causam agere non potest* 'who knows not in what words a summons to divide should be made &c.' *herctum* is supine. Festus p. 82 *erctum citumque*, Gell. i. 9 *ercto non cito* are not easily explicable in the absence of the context. I suspect a mistake.

**communi diuidundo]** i. e. more fully *in communi diuidundo iudicio*, 'in a judicial proceeding for the division of common property'. This proceeding, doubtless of later birth than the *fam. erc. iudicium*, was applicable to obtain a division of any property held in common which was not part of a common inheritance (D. x. 3. l. 1—l. 4). The expenses, liabilities, faults and profits of the tenants in common in respect of the common property were dealt with by the judge (often called *arbiter*) who had similar powers to those exercised in the *fam. erc. iud.* (l 3. pr.; l 6. §§ 10, 11; l 7. pr. § 10 &c.). This proceeding was applicable also in the case of inheritance (xvii.

2. l 34) and in cases of regular partnership. But it differed from the regular partnership action (*pro socio*), in not being concerned with the general duties and rights of the partners, and in particular took no account of debts. But it gave real rights to the property adjudged (see next note) whereas the *actio pro socio* resulted only in obligations (ib. l. 43). Cicero alludes to this proceeding *com. diu.* in a letter to the lawyer Trebatius (*Fam.* VII. 12. § 2).

**adiudicauerit**] 'adjudged' i.e. 'assigned as his property'. The word is technical and is used of the judicial assignment of a thing to a suitor, especially when the effect of the judgment is not merely the declaration of an existing right, or a condemnation in damages, but the creation of a fresh title. It is chiefly found in connexion with the *iudicia finium regundorum*, *fam. etc.* and *com. diu.* (D. II. 1. l 11. § 2; Ulp. XIX. 6). The ordinary frame of a formula received in these suits a change, its concluding part having an *adiudicatio* (as well as a *condemnatio*), to enable the judge to assign a specific thing or part of a thing to one of the parties (Gai. IV. 42). Rudorff (*Edict.* p. 86) restores the *formula com. diu.* thus. *Iudex esto, Quod ille fundus illi et illi communis est, quam ob rem ille illum communi diuidundo prouocauit* (or *ambo communi diuidundo arbitrum sibi dari postulauerunt*), *quantum ob eam rem alteri ab altero aut Titio adiudicari oportet, id iudex alteri aut Titio adiudicato, quodque alterum alteri si non paret ob eam rem dare facere praestare oportet, ex fide bona eius iudex alterum alteri condemnna: Si non paret, absolutio* (where Titius is a third party to whom the property has been sold; cf. Cod. III. 37. l 3. § 31; D. X. 3. l 7. § 13). A slightly different restoration is given by Keller *Civ. Pro.* n. 458. See also Bekker *Akt.* I. 231. A very different restoration, in my judgment not so probable, is given by O. Lenel *Edict. Perp.* p. 163: all are conjectural.

*Adiudicare* is used in a similar meaning in Cic. *Agr.* II. 17. § 43; *Off.* I. 10. § 33 sqq. For a somewhat different use (*adiudicatus*=*addictus*) see Gai. III. 189; Paul. *Sent.* II. 21. § 17; cf. Quintil. VII. 3. §§ 26, 27.

§ 2. **adquiritur autem**] Acquisition of a usufruct is opposed to the constitution of it, only as laying stress on the position of the receiver. As a usufruct is essentially connected with a particular person (D. VII. 4. l 3. § 3; Vat. Fr. 55), and endures only so long as that person endures, the constitution and acquisition are simultaneous. There is no transference of an already created usufruct.

A difficult question arises in connexion with acquisition through a slave. Is the usufruct thus acquired to be regarded as in connexion with the person of the slave or the person of the owner? Will it consequently perish on the death of the slave or on the death of the owner? If the slave is manumitted or alienated, is it retained by the former owner, or is it lost, or does it pass with the slave and become his, if he be set free, or his new master's, if he be sold? And how if the slave be the property of several persons as joint owners, or be partially alienated? It is clear from the Vatican Fragments (§§ 75, 82) and from Cod. III. 33. ll 15, 17 that there was

a good deal of discussion and doubt on some of these points among the lawyers. Although the language of Justinian is general (*per servum acquisitus*) it can hardly be understood to relate to any but cases of inheritance or legacy or gift, not to stipulation. Where the slave stipulates, he is as it were the mere instrument of his master, and the master acquires just as though his own voice had put the question (D. XLV. 3. 1 40); the master's person would be alone regarded in the fate of the usufruct. Paul's statement (Vat. Fr. § 57) is decisively for this. And any other conclusion would be unsuited to the use of slaves as agents for corporate bodies (see note below on l 56). But in cases of inheritance legacy or gift conflicting considerations arise. Was the testator or donor thinking of benefiting the slave or of benefiting his master? (See l 22.) Did he contemplate the heir or legatee of the property being kept out of the usufruct for the life of the slave—a period which he could estimate—or for the life of some one unknown to whom the present owner might sell the slave, or for the life of the longest survivor of a number of joint owners of the slave? The language of Paul in Vat. Fr. 57 *ususfructus*, '*do lego*' *servo legatus, morte et alienatione servi perit* probably, as Mandry (*Fam. Güter-recht* I. p. 82) remarks, refers to the case of the slave's death or alienation before the legacy vested, and is therefore not of general import (compare the neighbouring fragments). Justinian relates (Cod. III. 33. l 15) that, when there was a slave who had become partially the property of another, the usufruct acquired through him by his former (entire) owner was variously considered, either to fail altogether, or to fail proportionally, or to remain with the former owner unaffected. Justinian, following Julian's opinion, decided in favour of this last view. But, if there were some who held that even a partial alienation of the slave destroyed the usufruct, we may argue *a fortiori* that those lawyers would have held that a total alienation would destroy it (cf. Savigny *Syst.* II. p. 79; Fitting *Castr. Pec.* p. 189 n. 7). No one seems to have held that the usufruct passed, wholly or partially, to the new master.

The same question arises when a usufruct is acquired through a son *in potestate*. Justinian made a peculiar decision (Cod. III. 33 l 17.) that, when a son was emancipated or died or suffered *diminutio capitis maxima* or *media*, the father retained the usufruct, and that, if the father died or suffered *dem. cap.*, the son retained the usufruct. This decision is certainly foreign to the Roman idea of usufruct as inherent in one person.

**per personas iuri nostro subiectas]** Probably Gaius wrote very much what we find given from Paulus in Vat. Fr. 51 *Adquiri nobis potest ususfructus et per eos quos in potestate mancipiæ habemus, sed non omnibus modis, sed legato, vel si heredibus illis institutis deducto usufructu proprietas legetur; per in iure cessionem autem vel iudicio familie eriscundæ non potest; per mancipationem ita potest, ut nos proprietatem, quæ illis mancipio data sit, deducto usufructu remancipemus.* Acquisition by surrender in court was not open to a slave, because he could not claim a thing as



his own (Gai. II. 96): nor could he, while a slave, be heir, and hence could not take part in a suit for partition of an inheritance (ib. §§ 187—189). In the case of slaves as in that of others who were not *sui iuris*, the inheritance or legacy was at once acquired by their master (Gai. II. 87; D. XXIX. 2. 179). By mancipation a usufruct could only be reserved, and therefore must already implicitly be one's own. If it was to be acquired by mancipation through a slave, it could be only by taking a previous act of mancipation in connexion with it. Thus *A*, having an estate and desiring to give *B* the usufruct of it, mancipates the estate to *B*'s slave on the understanding that *B* should thereupon remancipate it to him, reserving the usufruct (comp. Pliny in note to l. 7. § 2 *alimenta*, p. 64). These methods are all that were available for establishing usufructs in Gaius' time, at least in Italian land.

What persons then were *nostro iuri subiecti* in Gaius' time? and in Justinian's? In two passages Gaius deals carefully with acquisition through others and in very similar words (II. 86 sq.; III. 163 sq.; cf. D. XLI. 1. 1 10). *Adquiritur autem nobis non solum per nosmet ipsos, sed etiam per eos quos in potestate manu mancipiæ habemus; item per eos seruos in quibus usumfructum habemus: item per homines liberos et seruos alienos quos bona fide possidemus* (Gai. II. 86). These classes then are (1) slaves (Gai. I. 52); (2) legitimate children (ib. 55); (3) adopted children (ib. 97); (4) wives *in manu* (ib. 108); (5) women copurchased in trust (ib. 114, 115); (6) persons in formal slavery as part of the process of emancipation (ib. 116, 123, 132, 140, 141); (7) slaves of which we have the usufruct; (8) freemen possessed by us *bona fide* as slaves; (9) other persons' slaves possessed by us *bona fide*. The last three classes are apparently distinguished from *nostro iuri subiecti* in Gai. II. 95, which is copied in Inst. II. 9. § 5: and acquisition through either of the last two was limited to what was acquired *ex re nostra* (i. e. *possessoris*) *uel ex operis suis*, and thus did not include gift, inheritance, or legacy. The same rule applied to slaves of which we have only the usufruct (Gai. II. 92—94), except so far as the intentions of the testator made a difference (see below, l 21 sqq.). Still as in Gaius' time stipulations were available to establish a usufruct as regards provincial land and between foreigners, and by Justinian's legislation were available also for land in Italy, it would seem that acquisition of a usufruct (e. g. by purchase *ex re nostra*) is possible by the instrumentality of *all* the above classes. *Iuri nostro subiectas* in the text must therefore be understood either to include these three last classes as being temporarily subject to our control (cf. D. XLVI. 4. l 11), or, if this expression excludes them, the use of it must be due to the fact that inheritance and legacy were the ordinary modes in which a usufruct was created and therefore chiefly present to the mind of the writer.

**nihil autem uetat, &c.]** The *autem* looks as if some words had preceded, declaring some modes of acquisition not to be available. Compare the Vat. Fr. quoted above.

The case here put is that of my slave being made heir, and a legacy of some property being charged on him in favour of some one else, the usufruct however being reserved: I become heir through him and have (*inter alia*) the reserved usufruct.

**l 7. pr. usu fructu legato]** The rights here mentioned would presumably belong to the usufructuary, however the usufruct was established, and not merely if he acquired it by bequest. Bas. speaks of the usufructuary without limitation. Comp. l 25. § 7.

**omnis fructus rei]** 'all the produce of the thing'. *Fructus* like many law expressions has, or may have, a different content, according to the circumstances. Besides the natural products from the soil or animals, the profits derivable from letting others have the use of our property, e.g. rents, interest of money, &c. are often treated as *fructus*. Modern writers have given these the name of *fructus civiles* as opposed to *fructus naturales*. The Romans said of them *vicem fructuum optinent* (D. xxii. 1. l 34); *pro fructibus accipiuntur* (ib. l 36); *in fructu numerari* (ib. l 19); *fructuum nomine computari* (viii. 5. l 4. § 2); *loco fructuum* 3. 9 (v. 3. l 29). The question what shall be considered as *fructus* arises in the recovery of an inheritance (D. v. 3. l 27, &c.) or of real property (D. vi. 1. l 17), in the sale of the same (xxii. 1. l 25); in the restoration of a dowry (xxiv. 3. l 17); and especially in the case of usufruct. The usufructuary was entitled, besides the actual use, to all the benefit which according to the nature of the thing or the general practice could be obtained from it. If it was land, he was entitled to whatever grows or is taken there (*quicquid in fundo nascitur uel quicquid inde percipitur* (below l 9. pr.; l 59 § 1); e.g. grapes and olives; stone, chalk and sand; mines; honey; game and fish; withes, reeds; cuttings from woods (l 9; l 13. § 5). If the land or houses were let, he was entitled to the rent (l 7. § 1; l 12. § 2; l 59. § 1); if it was a ship, to the freight (l 12. § 1); if animals, to their young, their hair, wool, milk, dung, &c. (vii. 8. l 12. § 2; xxii. 1. l 28). Slaves were not regarded as merely animals, and therefore their services or the hire of them might be claimed, but their children belonged to the owner of the mother, not to the usufructuary (below, l 68). The details of the matter come in view in the course of this title.

**pertinet]** 'belongs to' i.e. as his own. *Pertinere* is however very wide in meaning. D. l. 16. l 181 (Pompon.) *Uerbum illud 'pertinere' latissime patet: nam et eis rebus petendis aptum est quae domini nostri sint, et eis quas iure aliquo possideamus quamuis non sint nostri domini: pertinere ad nos etiam ea dicimus quae in nulla eorum causa sint, sed esse possint*. For an instance of this last see below l 27. pr.

**rei soli aut rei mobilis]** frequently used in opposition to one another as immoveables and moveables. D. xiii. 3. l 1. pr.; xv. 1. l 7. § 4; l. 16. l 222. Moveables sometimes included animals (e.g. vi. 1. l 1. § 1 *Haec actio locum habet in omnibus rebus mobilibus tam animalibus quam his quae anima carent, et in his quae solo continentur*); sometimes was

distinguished from them (XXI. 1. 1 1. § 1 *de uenditionibus rerum tam earum quae soli sint quam quae mobiles aut se mouentes*).

§ 1. **puta**] 'suppose', i.e. 'for instance', is used in post-Augustan writers both with a dependent object sentence, e.g. *puta me uitam pro uita reddidisse* (Sen. Ben. III. 31. § 1), and, as here, parenthetically: *eo loco, quo neque neruus neque musculus est, ut puta, in fronti* (Cels. v. 26. § 21). So below 1 12. § 3; 1 15. § 6; I. 7. 1 34; II. 15. 1 9. § 10; XLI. 4. 1 2. § 12; XLV. 1. 1 72. pr. : &c.

**reditus**] 'return', 'proceeds', 'revenue'. Cf. 1 9. § 5; D. XXXIII. 2. rubr.; 1 16; 1 17; 1 22; 1 25; 1 38. Colum. III. 3. § 2 *Studiosi agricolationis hoc primum docendi sunt, uberrimum esse reditum uinearum*.

**obuentiones**] 'payments coming in'. The word appears to be general in meaning D. XIV. 1. 1 1. § 15; XXII. 1. 1 34; XXVII. 9. 1 5. § 9. *Obuenire* is used of offices coming to a person, e.g. D. IV. 8. 1 32. § 4; *Coll. Mos. I. 3. § 1*; Suet. *Iul. 7 quaestori ulterior Hispania obuenuit*; and frequently of inheritances or legacies falling to a person; e.g. *Lex Agrar. 23*; D. VI. 1. 1 20, &c.; sometimes generally; Gai. III. 151 *Si quis in hoc renuntiauerit societati, ut obueniens aliquod lucrum solus habeat*. The *obuentiones* appear to have been accidental or occasional gains opposed to the regular rents. An example is given in the immediate context.

**areis**] Plots of land whether for planting (Col. v. 6. § 6), threshing (Id. II. 20. § 2), or 'building-ground not built on'. *Locus sine aedificio in urbe area, rure autem ager appellatur* (D. I. 16. 1 211).

**ceteris quaecumque aedium sunt**] In the case of a sale the appurtenances of a house are thus described in D. XIX. 1. 1 13. §§ 31—1 17 *Aedibus distractis uel legatis, ea esse aedium solemus dicere, quae quasi pars aedium uel propter aedes habentur, ut puta, putealia, lines (?) et labra, salientes. Fistulae quoque quae salientibus iunguntur, quamuis longe excurrant extra aedificium, aedium sunt; item canales. Aedium multa esse, quae aedibus affixa non sunt, ignorari non oportet, ut puta seras, claues, claustra*. What *obuentiones* could come from these is not clear, unless it were damages for their obstruction or injury. Probably the expression in our text is meant as a general expression only to cover possible circumstances, not distinctly conceived.

**mitti in possessionem**] There were four cases in which this order was made by the Praetor. 1. When the heir refused to give security to the legatees or persons claiming under a trust (XXXVI. 4); 2. When a widow was pregnant, and the child when born would have a claim to an inheritance (XXXVII. 9); 3. When a person has given security for his appearance to a suit, and neither appears nor is defended (XLII. 4); 4. When damage is apprehended from the ruinous condition of a neighbouring house, and the possessor refuses to give security (XXXIX. 2). In the last case the possession is only of the specific building in question, in the others it is of all the property (cf. XLII. 4. 1 1). In the first two cases the step was only to keep the property safe: in the third it was sometimes preparatory to a



sale : as to the fourth see the next note. Refusal to admit into possession the person so sent subjected the offender to an action *in factum* and also to an interdict *ne uis fiat* (D. XLIII. 4).

**causa damni infecti]** The owner or lawful occupier of a house or land, which stood in danger of damage from the defective condition (*uitium*) of another building or other land, was allowed by the Praetor to demand security from the owner, superficiary, fructuary, pledgee, &c. of the ruinous building or land against the danger apprehended, though not yet done (*damnum infectum*). The security required was in the case of an owner his own formal promise (*repromissio*), in the case of most others, including a usufructuary (D. XXXIX. 2. 19. § 5) was the formal promise of others (*satis datio*) as well. If security was not given within the time fixed by the praetor, he gave the complainant the right to occupy (*in possessionem ire*) the dangerous property without however ejecting the owner (1 15). He is allowed, but is not obliged, to prop up or repair the dangerous building, &c., and is entitled to his costs (1 15. §§ 30, 31). If the owner abandons the property or still refuses to give security, the Praetor on finding sufficient ground in these or other facts (*causa cognita*), decreed the effective possession (*possidere*) to the complainant, a possession which in due time ripened into ownership (1 15. §§ 16, 21). This is compared by Ulpian to the *noxae deditio* authorised in the case of slaves who have committed torts 17. § 1. The words of the edict are given in 17. pr. of that title. See also *Lex Rubr.* 20 (Bruns p. 91).

The order of the words is irregular, the ablative *causa* being rarely prefixed to its genitive either in classical or in law Latin. It does so occur however in Ter. *Eun.* 202 ; Suet. *Aug.* 24. None of the passages in Livy, given by Klotz *Lex.* s.v., have this order, at least in Madvig's edition. See his *Emend. ad Liv.* XL. 41. § 11 (p. 474).

**iure dominii poss.]** 'possess as owner'. So also D. XXXIX. 2. 1 15. § 33. By the first decree he would only *in possessione esse*, i.e. have merely the custody of the house : by the second decree he would actually possess (*possidere*) with the intention of holding as owner ; and after the expiration of the prescribed time (see on 1 5), would gain the real ownership, cf. D. XLI. 2. 1 3. § 23 *Qui creditorem rei seruandae causa, uel quia damni infecti non caueatur, mittit in possessionem, uel uentris nomine, non possessionem sed custodiam rerum et obseruationem concedit ; et ideo cum damni infecti non cauente uicino in possessionem missi sumus, si id longo tempore fiat, etiam possidere nobis et per longem possessionem capere praetor causa cognita permittit*, cf. ib. 1 10. § 1. *Capere* is here equal to *in suum dominium capere* (D. XXXIX. 2. 1 5. § 1) : so 1 18. § 15 *qui iussu praetoris coeperat possidere et possidendo dominium capere*. After the second decree the complainant would be possessor *bona fide* and *ex iusta causa*, and would have, to protect his right, the interdict (*utile*) *de ui* and the *Publiciana actio* (ib. 1 18. § 15). Under the ante-Justinian law he would have had the house, &c., *in bonis*, and by usucapion (for which Tribonian has substituted

*per longam possessionem*, &c.) would eventually have acquired the *dominium ex iure Quiritium*. And hence he is sometimes called *dominus*, l 15. §§ 16, 17; and spoken of as having the right of *vindictio* (x. 3. l 7. § 9). As regards Justinian's law, most modern writers (against Cujacius and others) hold that he becomes owner at once on the second decree, and that the passages, in which gaining the ownership by continued possession is spoken of, are to be understood of those cases only in which the defendant was not owner. See Savigny *Syst.*, iv. p. 566; Vangerow, § 678. vii. 2 (Vol. iii. p. 559); Burekhard in Glück h. t. § 1680, p. 556 sqq. But nothing is seen of this distinction in the Digest, and the context shews that *dominus constituitur* is not to be taken in the full sense, but only as possessor with the intention to hold as owner, and with the Praetor's protection till he becomes so. *Julianus scribit eum, qui in possessionem damni infecti nomine mittitur, non prius incipere per longum tempus dominium capere, quam secundo decreto a praetore dominus constituatur* (l 15. § 16). This cannot surely be taken epigrammatically 'he cannot begin to gain ownership before he actually becomes owner'. If not, it shews that *dominus constituitur* means only 'is put in the owner's place'.

**si perseueretur non caueri**] 'if security continues not to be given'. Cf. D. xxxix. 2. l 4. § 4, *si duretur non caueri*. The active form of *perseuerare* is also found used impersonally, D. xxxix. 1. l 20. § 14 *et si satisdatum sit, cautum tamen non perseueret, interdictum cessat*.

**caueri**] *Cauere* is used generally both of taking security and of giving security. For the former cf. D. ii. 15. l 3. pr. *Scriptus heres in transactione hereditatis aut cauit sibi pro oneribus hereditatis, aut, si non cauit, non debet negligentiam suam ad alienam iniuriam referre*; L. 17. l 73. § 4 *Nec paciscendo nec legem dicendo nec stipulando quisquam alteri cauere potest*; Cic. *Brut.* 5. § 18 *Tibi ego, Bruti, non soluam, nisi prius a te cauero, amplius eo nomine neminem cuius petitio sit petiturum*; &c. For the latter, which in the Digest is the more common use, cf. Tac. *A.* vi. 17 *Si debitor populo in duplum praediis cauisset*; D. ii. 8. l 8. § 1 *qui mulierem adhibet ad satisdandum, non uidetur cauere*; ib. § 4 *tutor et curator, ut rem saluam fore pupillo caueant, mittendi sunt in municipium*; &c. Frequently in the passive impersonal, e.g. Cic. *Verr.* ii. Lib. i. 54, § 142 *Praedibus et praediis populo cautum est*. (*Cauere* is also often used of provisions in a law, e.g. D. xxxvii. 8. l 2; Gai. ii. 253; or in a will, &c., Gai. ii. 181, &c.)

The methods of giving security were (1) a man's own promise in reply to a stipulation. This was often called *repromissio* (cf. D. xlvi. 5. l 1. § 6, *hi, qui suo nomine cauent, repromittunt; qui alieno, satisdant*; D. xlvi. 6. l 1. § 6), and according to Justinian (Cod. vi. 38. l 3) was to be understood where the word *cautio* occurred, unless *satisdatio* or *fideiussio* was expressly mentioned. (2) Sureties, who become bound in the same way by stipulation. This was called *satisdatio* or *fideiussio* (D. ii. 8. l 1). The creditor's action in this case was *satis acceptio* (D. xlv. 1. l 5. § 3). Before Justinian there were three classes of sureties, *sponsor*, *fidepromissor*, *fideiussor*; see Gai. iii.

115—127. (3) Pledges, cf. D. XL. 5. 14. § 8 *cauendum est idonee. Quid est idonee? satisdato utique aut pignoribus datis*; ib. XIII. 7. 19. § 3. (4) Occasionally an oath was accepted when *satisdatio* was beyond the party's means (Cod. VII. 17. 11. § 2), or disrespectful to his dignity (Cod. XII. 1. 117. pr.). Cf. *Inst.* IV. 11. 12. In earlier times persons who held public money or undertook public contracts gave both personal and real security, *praedibus et praediis*; see Cic. *Verr.* quoted above; Liv. XXII. 60. § 4; *Lex Agrar.* 43—48, 74 (Bruns pp. 74, 78); and especially *Lex Malac.* 60. 64, 65, which tells us the summary powers of execution. Cf. Kuntze *Excurs. zu* § 556 (p. 506, ed. 2).

**nec quicquam amittere]** The right to a neighbouring house or other dangerous property, acquired by the usufructuary under the second decree of the Praetor, did not lapse when the usufruct lapsed, e.g. on the death of the usufructuary: the property, thus acquired, passed to his heirs. This accession of property was regarded as a *fructus*.

**hac ratione]** 'on this principle', 'similarly'. Cf. 112. § 5; 168. pr.; Paul. *Sent.* IV. 8. § 22 *idque iure civili Uoconiana ratione uidetur effectum* 'on the principle of the *lex Uoconia*'; Gai. IV. 179 *qua ratione*; I. 63 *alia ratione*, &c. The principle in this case appears to be the fructuary's right to the complete and exclusive use and enjoyment of the profits of the land, of which he has the usufruct, which use and profits might be impaired or risked by alterations.

**nec aedificium, &c.]** 'The owner cannot raise higher the house, of which you have the usufruct, without your consent'. Nor has the usufructuary the right to do so (113. § 7). The question of raising another house with the effect of darkening the usufructuary's is different (below 130). To prevent that, you must prove that the house so raised is subject to the usufructuary's house in this respect (D. VIII. 2. 19).

**nec areae, &c.]** A house erected on this plot, and remaining there, so changes the character of the plot, that the usufruct is lost (D. VII. 4. 15. § 3—17). The erection of a mere shed or hut (*casa*) has not this effect (below 173). Nor does the erection of a house destroy the usufruct, if the house be removed, before the period has expired, within which non-use brings about the loss of usufruct (ib. 171).

§ 2. **reficere]** 'to repair'. Cf. 164; D. VII. 8. 118. In D. XLIII. 21. 1. 16 Ulpian commenting on the Praetor's edict *riuos specus septa reficere purgare aquae ducendae causa* &c. says *reficere est quod corruptum est in pristinum statum restaurare. Verbo reficiendi tegere (tergere conj. Mommsen), substruere, sarcire, aedificare, item aduchere adportareque ea quae ad eandem rem opus essent, continentur*; v. 1. 176 (*respondi*) *nauem, si adeo saepe refecta esset, ut nulla tabula eadem permaneret quae non noua fuisset, nihilo minus eandem nauem esse existimari*; XXV. 1. 11. § 3; 114; Suet. *Aug.* 30 *aedes sacras uetustate collapsas aut incendio absumptas refecit*.

**per arbitrum cogi]** The usufructuary is compelled by the arbitrator to repair the house of which he has the usufruct, unless he choose to relin-



quish the usufruct (l 48; l 64). The extent of the obligation to repair is defined subsequently in this fragment of Ulpian.

The action to compel him is that arising out of the stipulation which the heir had by the Praetor's edict the right to impose on the usufructuary (D. VII. 9). And the same stipulation was held to be proper (*debebit haec cautio praestari*), if the usufruct was constituted by a *donatio mortis causa* or in any other way. If it was left by way of trust, the stipulation was adapted (l 13. pr.; D. VII. 9. l 1. § 2; Cod. III. 33. l 4). The stipulation was accompanied by securities. *Usufructu legato de modo utendi cautio a fructuario solet interponi, et ideo perinde omnia se usurum ac si optimus paterfamilias uteretur, fideiussoribus oblatis, cauere cogitur* (Paul. Sent. III. 6. § 27). More precisely, the import of the stipulation was twofold, (1) *et usurum se boni uiri arbitrato, et, cum ususfructus ad eum pertinere desinet, restitutum quod inde exstabit*; and (2) *dolum malum abesse afuturumque esse* (D. VII. 9. l 1. pr.). The first of these two clauses is given more fully ib. § 3. *Cauere autem debet uiri boni arbitrato perceptu* (=perceptum) *iri usumfructum, hoc est, non deteriorem se causam ususfructus facturum ceteraque facturum quae in re sua faceret*. It was proper for heir and legatee to have evidence taken (*in testatum redigere*; cf. D. XXXII. l 39. § 1), probably reduced to writing, of the state of the thing at the commencement of the usufruct, in order to measure any alleged deterioration. The benefit of the stipulation was not exhausted by action once taken on it: it could be enforced as often as required on the occurrence of any undue use (VII. 9. l 1. §§ 4—6). The action being *ex stipulatu* was properly one *stricti iuris*, i.e. based on strict right, as opposed to an action based on equitable consideration of the circumstances (*bona fide actio*); but the content of the stipulation, requiring the measure to be applied of what a good man thought right, and including the clause *de dolo*, gave it in fact the character of a *bona fide* action. The judge is hence an arbiter. (Comp. Savigny *System* vol. v. pp. 492, 617—619.)

**arbitrum]** *Arbiter* according to the etymology generally accepted is from *ar=ad* and *betere* 'go': and hence denotes strictly 'visitor', 'witness' (Plaut. *Mil. G.* 158 *mi equidem iam arbitri uicini sunt, meae quid fiat domi*; Cornif. II. 4. § 7 *Spes celandi quae fuerit, quaeritur ex consociis arbitris adiutoribus, liberis aut seruis*; Sall. *Cat.* 20. § 1 &c.; see lexx.); and thus came to be used of those judges who were conceived as impartial bystanders. Cicero (*Mur.* 12. § 27) mocks at the jurists for not being able to tell whether *iudex* or *arbiter* was the proper word (cf. Val. Prob. p. 144 *Krüger te, Praetor, iudicem arbitrumue postulo uti des*); but in *Rosc. Com.* 4 gives the general characteristics of a judicial action before a judge and an arbiter, the former having cases where a definite thing or amount was claimed and the judge had simply to decide, aye or no, the latter having cases where an equitable decision had to be arrived at on consideration of the circumstances and of the mutual liabilities

of the parties. Hence an arbiter had jurisdiction in defining boundaries, dividing inheritances, or other common property (D. x. 1, 2, 3); examination of accounts (D. v. 1. 1 53); disputes between neighbours as to raising a house (D. viii. 2. 1 11), and many other cases (Rudorff *Rechtsgeschichte* II. § 6). Obviously the question, whether a usufructuary was properly or improperly using the property and keeping the house in due repair, was a matter not to be decided on any strict construction of laws and precedents, and was therefore suited for a tribunal which would act on common sense and experience of usual business arrangements rather than on any nice knowledge of technical law. A visit to the spot would naturally in many cases be made.

**cogi]** *Cogere* is perpetually used of the action of a judge; e.g. *non necesse erit L. Octavio iudici cogere P. Servilium Q. Catulo fundum restituere aut condemnare* (Cic. *Verr.* II. 12. § 31); *respondit non oportere iudicem cogere ut eum traderet* (D. vi. 1. 1 58); *saepe etiam inuitus auctor fieri a praetore cogitur* (Gai. I. 190); D. xl. 5. 1 24. § 12 sqq., &c.

**h. t. ut sarta tecta habeat]** ‘only however to this extent, that he keep the property mended and covered’. *Sarta tecta* is an old technical expression for ‘in good repair’. The earliest instance extant is in a metaphorical sense in Plaut. *Trin.* 317 *sarta tecta tua praecepta usque habui mea modestia*. So Cic. *Fam.* XIII. 50 *hoc mihi da atque largire ut M. Curium sartum et tectum, ut aiunt, ab omnique incommodo detrimento molestia sincerum integrumque conserues*. The phrase is chiefly found applied to public buildings: Cic. *Verr.* I. 50. § 131 *Quaesivit quis aedem Castoris sartam tectam deberet tradere*; and again, *monumentum quamvis sartum tectum integrumque esset*; D. I. 16. 1 7. § 1 (Ulp.) *aedes sacras et opera publica circumire (debet proconsul) inspiciendi gratia, an sarta tectaque sint uel an aliqua refectione indigeant*. Hence *sarta tecta tueri* is to look after the repairs of public buildings; *exigere*, to examine or approve the repairs: Cic. *Verr.* I. 49. § 128 *In sartis tectis uero quemadmodum se gesserit, quid ego dicam?* ib. 50. § 130; *Fam.* XIII. 11. § 1; Liv. XXIX. 37. § 2 *sarta tecta acriter et cum summa fide exegerunt (censores)*; XLII. 3. § 7 Madv.; XLV. 15. § 9; D. VII. 8. 1 18 *Si domus usus legatus sit sine fructu, communis reffectio est rei in sartis tectis tam heredis quam usuarii*; XLVIII. 11. 1 7. § 2; Cod. Just. III. 33. 1 7 (anno 243) *eum, ad quem ususfructus pertinet, sarta tecta suis sumptibus praestare debere explorati iuris est*; Cod. Theod. XIV. 6. 1 3; Charisius, p. 220, ed. Keil; Festus, pp. 229, 322.

The proper meaning of *sarcire* is clearly ‘to make up a breach’, ‘mend’, ‘make good’; Plaut. *Most.* 147 *Ita tigna umide haec putent; non uideor mihi sarcire posse aedis meas quin totae perpetuae ruant*; *Epid.* 455; Cato *R. R.* 23; 31 of mending baskets; and 39 of casks; Varr. *L. L.* VI. § 64 of clothes; *Lex Quintia ap. Frontin. Aquaed.* 129 *Quicumque post hanc legem rogatam riuos specus fornices fistulas...aquarum publicarum, quae ad urbem ducunt, sciens dolo malo forauerit ruperit...*

*peioraue fecerit, ... id omne sarcire reficere restituere aedificare ponere et celere demolire damnas esto*; D. XLIII. 21. 11. § 6. A metaphorical use is found in Gell. XI. 18, who says the XII. tables *impubem praetoris arbitratu uerberari uoluerunt noxiamque de iis factam sarciri*; D. XXXV. 2. 1 23; Paul. *Sent.* II. 31. § 7. See Mommsen *Staatsrecht* II. pp. 443, 444 ed. 2; Sell *de rupitiis sarcieendis*, p. 8.

**corruissent**] 'had fallen down'. Cf. Cic. *Att.* XIV. 9. § 1 *tabernae mihi duae corruerunt reliquaeque rimas agunt, itaque non solum inquilini sed mures etiam migrauerunt*; D. XXXIX. 2. 144. pr. Also of ground sinking, D. XIX. 2. 1 15. § 2; 133. On this matter see Cic. *Top.* 3. § 15 *si aedes eae corruerunt uitiumue fecerunt, quarum ususfructus legatus est, heres restituere non debet nec reficere, non magis quam seruum restituere, si is, cuius ususfructus legatus esset, deperisset*.

**passurum**] 'The heir will (have to) allow the fructuary to use it'. (The German translator takes it quite wrongly, 'so muss der Niessbraucher ihm den Gebrauch verstatten').

**de modo sarta tecta habendi**] 'of the mode of keeping in repair'; i.e. of the nature and amount of repairs which he is bound to do. Cf. D. VIII. 5. 1 6. § 2 *Etiam de seruitute, quae oneris ferendi causa imposita erit, actio nobis competit, ut et onera ferat et aedificia reficiat ad eum modum qui seruitute imposita comprehensus est*, i.e. to the extent implied by the nature of the servitude. The obligation was to keep the thing in the state it was when he received it, and this involves due repair: but if the building was so bad that it fell of itself (without any negligence on the part of the usufructuary), rebuilding would put it into a far better state, and that is not part of the usufructuary's duty. If the buildings are only incidental to the estate of which the fructuary has the use, he would continue to use the estate; if the building is itself that of which he has the use, the use dies with the extinction of the building (D. VII. 4. 1 5. § 2). The case put just above of the heir rebuilding and still allowing the fructuary to enjoy, is clearly applicable only where the buildings are not themselves the sole object of the usufruct, and where consequently the usufruct does not die with the building. The ambiguity of *reficere* ('repairing' or 'rebuilding') has led to a corruption of the text of D. XXXIX. 2. 1 20, where *non pertinet* is true if rebuilding is meant by *refectio*, and the Florentine MS. and Bas. contain the negative. But *eius ipsius* seems to require a duty of the fructuary, and therefore Mommsen is right in proposing to omit *non* (cf. Glück, IX. p. 254).

**si quae—cogitur**] i.e. 'the measure of the fructuary's duty to repair becomes an important question if he is not obliged to rebuild what has fallen from age. What then is he bound to do?' (*Si...cogitur* is not a dependent question 'asks whether he is compellable').

**ad eum pertinet**] 'belongs to him', in this case, as burden; more usually the word is used of benefits, e.g. 19 *passim*. See note on *pertinet*, p. 54. In the present use cf. 1 27. § 3.



**quoniam]** As the usufructuary is liable to other burdens, there is nothing strange in supposing him to be liable to the duty of repairs.

**adgnoscit]** 'the usufructuary acknowledges', i.e. 'accepts', 'has to bear'. Cf. 150; D. II. 14. 142 *Inter debitorem et creditorem convenerat ut creditor onus tributi praedii pignerati non adgnosceret*; X. 4. 111. § 1; XXVIII. 5. 135. § 1 *Refert Papinianus pro hereditariis partibus eos adgnoscerere aes alienum debere*; XXXIV. 1. 115. pr., &c. So, of the Crown (*fiscus*) accepting a forfeiture, *bona adgnoscit* D. XXX. 150. § 2; XL. 5. 14. § 17; of a legatee accepting a legacy (D. XXX. 181. § 1); of a town accepting the *bonorum possessio* (XXXVII. 1. 13. § 4).

**usu fructu legato]** This is added probably to emphasize the case of a usufructuary (cf. 152) as distinguished from one who had the use only. The latter would not have to bear such burdens, or, at any rate, not by himself (D. VII. 8. 118).

**stipendium uel tributum]** *Stipendium* was originally the pay of the soldiers; *tributum* was a tax imposed for the purpose of raising money for this pay (Liv. IV. 59 fin.; 60). And the same meaning of the words is applied to Carthage in Liv. XXXIII. 47. § 2, and in the speech of Cerialis to the Treviri, by Tac. H. IV. 74 *neque quies gentium sine armis, neque arma sine stipendiis, neque stipendia sine tributis haberi queunt*. On the conquest of a province a tax was imposed to defray the charges of the war, and thus both terms came to be applied to taxes levied on the provincials, the principal tax being one on the land, whether in the nature of tithe or of a fixed sum. Cf. Suet. Iul. 25 *Galliam in provinciae formam redegit, eique... in singulos annos stipendii nomine imposuit*, D. L. 16. 127. § 1. The terms *stipendium* and *tributum* then differed only according to the administrative position of the province, i.e. as under the senate or under the emperor. Cf. Gai. II. 21 *Stipendiaria praedia sunt ea quae in his provinciis sunt quae propriae populi Romani esse intelleguntur; tributaria sunt ea quae in his provinciis sunt quae propriae Caesaris esse creduntur*; Frontin. p. 36, ed. Lachm. See Marquardt *Staatsverwaltung* II. pp. 157, 178, 189, &c.; Mommsen *Staatsrecht* II. 961; Madvig *Verfassung* II. p. 387 sqq. The Vatican fragments speak of *praedium stipendiarium* (§ 259); *stip. uel tributarium* (§ 289); *res tributaria* (§ 315); cf. ib. §§ 61, 285; Cod. Theod. VII. 20. 18.

With our passage cf. D. XXV. 1. 113 *neque stipendium neque tributum ob dotalem fundum praestita exigere uir a muliere potest, onus enim fructuum haec impendia sunt*. The *tributum* is often mentioned in the Digest, e.g. II. 14. 152. § 2; XXX. 139. § 5; XXXIII. 2. 132. § 9; XXXIX. 4. 11. § 1; XLVIII. 18. 11. § 20. Respecting the returns of property on which the tax was founded, and the mode of collection, see D. L. 15. 14; 15; 18. § 7. Respecting the obligation of the usufructuary to this and similar imposts see below 127. § 3; 152; XXXIII. 2. 128. Arrears of taxes remained as a charge on the estate even though confiscated and sold by the Crown (D. XLIX. 14. 136), but when an estate was bequeathed the heir was re-

quired to defray them (xxx. 1 39. § 5, quoted in next note); and presumably the same rule would apply to the bequest of a usufruct.

**solarium]** The mss. have *salarium*. Bas. has ὁ τὴν χρῆσιν ἔχων τῶν καρπῶν δίδωσι τὰ δημόσια καὶ τὰ δαπανήματα καὶ τὰς ἐκ τοῦ πράγματος εἰσθίσις διατροφάς, whence Mommsen concludes that the Greeks read *salarium* and understood by it the payment of the farmer; which seems probable. But we do not find *salarium* used in this sense. Originally it was 'salt money', i.e. an allowance to soldiers and other public servants to buy salt (comp. English 'pin-money'). Hence it was applied to any customary payment, e.g. Tac. Agr. 42 *salarium proconsulare solitum afferri et quibusdam a se ipso concessum Agricola non dedit*; D. i. 22. 14; or salary, e.g. D. L. 9. 14. § 2 *si salarium alicui decuriones decreuerint...ob liberalem artem uel ob medicinam: ob has enim causas licet constitui salaria*; xvii. 2. 152. § 8 *stipendia ceteraque salaria in commune redigi iudicio societatis* (ait Papinianus). Thus in lieu of a charge for *alimenta* there was sometimes given a fixed annual payment, which is called *salarium*, D. ii. 15. 18. § 23 *si in annos singulos certa quantitas alicui fuerit relicta homini honestioris loci uelut salarium annuum uel ususfructus*; xxxiii. 1. 1 19. § 2; cf. xxxiv. 1. 1 16. § 1. If *salarium* were the right reading in our passage, it would mean a salary charged on a particular estate, just as *alimenta* were sometimes charged, but could hardly mean the ordinary wages of a husbandman or steward.

But *solarium* ('a ground-rent') is suggested by Mommsen, and is doubtless what Ulpian wrote. Cf. D. xxx. 1 39. § 5 (Ulp.) *Heres cogitur legati praedii soluere uectigal praeteritum uel tributum uel solarium uel cloacarium uel pro aquae forma*; xx. 4. 1 15; xliii. 8. 1 2. § 17; Inscr. ap. Bruns pp. 222, 223 (= Wilmanns No. 2840) *Petimus igitur aream adsignari ei iubetis, praestituto secundum exemplum ceterorum solarium*.

**alimenta]** Mention is often made of testators providing in their will for the support of their freedmen. See D. xxxiv. 1. Under *alimenta* were included food, clothing and lodging (ib. 1 6). Where the amount was not specified by the testator, the measure was the latest practice of the testator himself, regard being had to the affection borne to the freedman by the testator (1 14. § 2; 1 22. pr.). The period for which the support was given was often for life: and, in the case of children, till the age of puberty, i.e. according to a constitution of Hadrian, to the 18th year for boys, to the 14th for girls. And these periods were held to be intended, if nothing specific was prescribed by the testator (1 14. pr.; § 1). M. Antoninus forbade any commutation of such allowances except with the Praetor's approval, if the commutation had the effect of substituting for a periodical allowance a sum paid once for all (D. ii. 15. 1 8. pr.; § 6); but any suitable arrangements for altering the place or time or mode of payment were valid (ib. 1 8. § 6; § 24).

Permanent endowments for such purposes were sometimes created. The emperors Nerva and Trajan commenced, and other emperors con-

tinued, the practice of securing in different parts of Italy funds for the sustentation of freeborn children. This was part of the imperial policy begun by Augustus for keeping up the numbers of Roman citizens. Two long inscriptions are preserved, giving the details of the investment of capital in land for this purpose: one in the neighbourhood of Beneventum of the year 101 A.D., the other near Veleia in Cisalpine Gaul of 103 A.D. The latter records an investment of 1,044,000 sesterces (nearly £11,000<sup>1</sup>) at 5 per cent. (cf. D. xxxiv. 1. 1 15. pr.; 1 16. § 2), the interest to be applied in the support of 245 *legitimi* at 16 sesterces per month each (=nearly 40s. a year), and 34 *legitimae* at 12 sesterces per month each (=nearly 30s. a year), besides one *spurius* at 12 sesterces and one *spuria* at 10 sesterces. In the other inscription the interest is reckoned at 2½ per cent.<sup>2</sup> Some private persons, amongst others Pliny the Younger, A.D. 97, at Como, founded similar charities. One at Terracina provided for 100 boys at 5 denarii per month each, and 100 girls at 4 denarii (=50s. and 40s. per year each). Three modes of securing such endowments are found: (a) a gift or legacy of money or land to a community (e.g. *municipium*), with instructions to pay from the yearly proceeds the cost of the *alimenta* or the sums fixed (Wilmanus *Inscr.* 2846, 2847); (b) the purchase of rent-charges on private estates, local or municipal officers collecting and distributing the proceeds: this was the method adopted by Trajan; (c) the grant to a community of a rent-charge out of land belonging to the founder. The last is the plan adopted by Pliny, whose letter (*Epist.* vii. 18) is worth transcribing, *Deliberas mecum quemadmodum pecunia, quam municipibus nostris in epulum obtulisti, post te quoque salua sit. Honesta consultatio, non expedita sententia. Numeres reipublicae summam? Uerendum est ne dilabatur. Des agros? ut publici, neglegentur. Equidem nihil commodius inuenio quam quod ipse feci. Nam pro quingentis milibus nummum, quae in alimenta ingenuorum ingenuarumque promiseram, agrum ex meis longe pluris actori publico (town clerk) mancipavi: eundem uectigali inposito recepi, tricena milia annua daturus (interest at 6 per cent.). Per hoc enim et reipublicae sors in tuto, nec redditus incertus, et ager ipse propter id, quod uectigal large supercurrit, semper dominum a quo exerceatur inueniet. Nec ignoro me plus aliquanto, quam donasse uideor, erogauisse, cum pulcherrimi agri pretium necessitas uectigalis infregerit. Sed oportet priuatis utilitatibus publicas, mortalibus aeternas anteferre, multoque diligentius muneri suo consulere quam facultatibus. For the method of 'standing charged with the rent' compare note on 1 6. § 2 *per personas*, &c. On the subject generally see Wilmanus *Inscr.* No. 2844—2848; Bruns *Pt.* 2. xi. 1. 2; Marquardt *Staatsverw.* ii. 137 sqq.; Mommsen *Corp. I. L.* ix. p. 129.*

<sup>1</sup> I take (as an approximate value) the aureus at 21s., denarius at 10d., sesterce at 2½d. Hultsch gives the aureus at 7.25 thalers, Mommsen at 6.8 thalers (Hultsch *Metrol.* p. 239).

<sup>2</sup> Mommsen suggests that this was half-yearly interest.



**ab ea re relicta]** 'left by will payable from (i. e. charged on) that property'. On the origin of this use of *relinquere* see n. on l 9. § 3 *relinquatur* (p. 71). The preposition *ab* is regularly used of the person charged with a legacy: e. g. below l 13. pr. *a quibus relictus*; l 36. § 2; Cic. *Top.* 4. § 21 *paterfamilias uxori ancillarum usum fructum legavit a filio, neque a secundo herede legavit*; Gai. II. 271 *a legatario legari non potest; sed fideicommissum legari potest. Quinetiam ab eo quoque, cui per fideicommissum relinquinus, rursus alii per fideicommissum relinquere possumus*. So also of a banker &c. on whom an order to pay is drawn; Cic. *Att.* VII. 18. § 4 *Quintus frater laborat, ut tibi quod debet ab Egnatio soluat*.

In the present case the charitable trust is charged on the estate, and the usufruct has been granted subject to this. In other cases a usufruct was bequeathed, and a charge for *alimenta* imposed on the usufructuary, which therefore lasted no longer than the usufructuary's life (D. XXXIV. 1. 120. § 2). In others again a usufruct itself was granted to the freedmen for their support (below l 57. § 1; cf. D. II. 15. l 8. § 23; XXXIV. 1. l 4. pr.).

§ 3. **adserere arbores]** 'to plant trees, i. e. for the vines to cling to'. The regular meaning of *adserere* is 'to plant near', e. g. of trees near vines (Catull. 61. 106); of vines near trees, Cato *R. R.* 32. § 2 *arbores facito uti bene maritae sint uitesque uti satis multae adserantur*; Varr. *R. R.* I. 16. § 6 *uitis adsita ad olus*; ib. 26; Hor. *Ep.* II. § 170 *qua populus adsita certis limitibus* 'planted close to defined balks'. Bas. has *κεντρίζει τὰ δένδρα* which is, I suppose, 'puts a graft into the trees'. Mommsen's inferior mss. have *subserere* (cf. l 13. § 2), i. e. 'to plant in place of decayed trees'. And so the German translator 'nachpflanzen'. The duty of the fructuary to keep up a nursery is spoken of lower down (l 9. § 6); so also to supply trees in place of those that have died (l 13. § 2; 18; *Inst.* II. 1. § 38; cf. below l 68. § 2 sqq.), but not in place of those blown down (l 59. pr.). But the present passage may well be taken in the proper sense of *adserere*, as such conduct is analogous to *modica refectio*; and this seems to be the sense of *quemadmodum* &c. The Greek translations and inferior mss. shew a misunderstanding of a somewhat technical expression.

**arbores]** is either a general term including vines, reeds, &c. so Pliny *N. H.* XVII. cf. §§ 9, 222; XII. § 4; or, more usually, denotes forest and fruit trees and the like. It is often opposed to vines e. g. Cato *R. R.* 32 *Uineas arboresque mature face incipias putare*; Varr. *R. R.* I. 2. § 6 *Non arboribus consita Italia est, ut tota pomarium uideatur? An Phrygia magis uitibus cooperta?* Columella *de arbor.* I. § 2 says expressly *ex surculo uel arbor procedit, ut olea, ficus, pinus; uel frutex, ut uiolae, rosae, arundines; uel tertium quiddam quod neque arborem neque fruticem proprie dixerimus, sicuti est uitis*. Cf. Col. *R. R.* III. 1. § 2; v. 6. § 1; 10. § 2 *Terra, quae uitibus apta est, etiam arboribus est utilis*; Ulp. D. XXV. 1. l 3 *uel si uites propagauerit uel arbores curauerit*; XVIII. 1. l 80. pr. *uites et arbores*. The XII. tables forbade cutting down trees; Plin. XVII. § 7 *fuit et arborum cura legibus priscis, cautumque est XII tabulis ut, qui iniuria cecidisset alienas,*

*lueret in singulas aeris* xxv. Gaius iv. § 11 speaks of the XII. tables giving the right of bringing an action *de arboribus succisis*, and of the fatal mistake in pleading made by one who brought an action for his vines having been cut down, and used the word *uites* instead of *arbores*. *Arbor* being often used to denote that to which a *uitis* was trained, a lawyer might very naturally hold that the XII. tables did not apply. But subsequent lawyers held that an action might be brought, either because they considered *arbor* to include *uitis* as a matter of language, or because they thought cutting down vines was within the mischief and should be within the remedy. Cf. D. XLVII. 7, esp. l 2 *Sciendum est eos, qui arbores et maxime uites ceciderint, etiam tamquam latrones puniri*; ib. l 3; XLIII. 27. l 1. § 3 *Uitem arboris appellatione contineri plerique ueterum existimauerunt*.

**non posse...prohiberi]** Having spoken of the usufructuary's obligation to repair, Ulpian turns to his *right* to repair. Cf. D. XXXIX. 2. l 18. § 2 (quoted below on l 9. § 7 *facultatem*).

**nec arare aut colere]** *colere* includes *arare*, as indeed according to Cato its principal part (Plin. XVIII. §.174). It denotes all farming and gardening operations, but did not properly include pasture or stock-keeping, except for manure; Varr. *R. R.* II. praef.; Col. *R. R.* I. § 25.

**necessarias refectiones]** The distinction between necessary repairs and ornamental improvements is one which appears in other legal relations; e.g. necessary expenses incurred by a husband on the dowry property may, unless quite of an ordinary character, be deducted by him on restoration of the dowry. Other expenses, whether belonging to the class of useful or to that of pleasurable expenses, are in a different position (D. xxv. 1). As examples of necessary expenses in the case of a dowry, are given throwing out moles into the sea, or the erection of a bakery or granary (in some cases), the repair of a ruinous house, if useful to the wife, the restoration of olive plantations, propagation of vines, care of trees, construction of suitable nursery-grounds, cure of slaves in illness, giving security against apprehended damage (ib. ll 1—3; ll 12, 14, 15). Paulus defines *necessary* expenses to be those which prevent the property from perishing or deteriorating; *useful*, those which make it better in point of productive power; *pleasurable*, those which adorn, without increasing its produce (D. L. 16. l 79). Some such question arises also in the case of expenditure on property in pledge (D. XIII. 7. l 8); expenditure by an agent (D. xv. 3. l 3. § 4; xvii. 1. l 10. § 9); or by a brother on property common to himself and a brother who is a minor (D. III. 5. l 26. pr.).

**uoluptatis causa]** Paul (D. L. 16. l 79) gives as instances of these in the case of a dowry *uiridia* ('shrubberies &c.', cf. Plin. *Ep.* v. 6. § 7; Vitruv. v. 9. § 5; D. VIII. 1. l 15; 2. l 12; below l 13. § 4) *et aquae salientes* ('fountains', D. XXXIII. 7. l 12. § 24); *incrustationes* ('slabs of marble' below l 13. § 7; XIX. 1. l 17. § 3, or 'moulded terra cotta figures' Plin. xxxv. § 154, let into the walls), *loricationes* ('coatings of cement'? cf.

Vitruv. VII. 1. § 4; II. 8. § 18); *picturae* ('pictures on the walls' below l 13. § 7).

**tectoria**] 'plasterings', i.e. the smooth coating which was given to walls and ceiling, and usually painted or coloured, cf. Vitruv. VII. 3. § 5 sqq. We must not take *facere* with it, but understand *reficere*. For to plaster what is rough is more than a usufructuary has a right to do (l 44); he may only repair.

**pauimenta**] 'pavements', i.e. tessellated, or mosaic, &c. Cf. Vitruv. VII. 1; Plin. XXXVI. § 184 sqq.; Marquardt *Priv. Alt.* p. 607 foll.

l 8. **quamvis melius repositurus sit**] 'although he purpose replacing it with something better'. He must not change the character of the house even though he improve it; but improvements of a minor character may be made. It is difficult to draw the line between what is forbidden here, and what is allowed in l 13. §§ 4, 7. Circumstances in the particular case would really decide.

l 9. pr. **quidquid in fundo nascitur, &c.**] The same double definition occurs in l 59. § 1 (Paulus). The two parts supplement one another. *Nascitur* might confine fruits to animal or vegetable products (though the term is used of islands, § 4, and *renascitur* of marble, D. XXIV. 7. l 13; so also *nasci* commonly in Pliny); and *percipi potest*, besides being in itself more general, directs attention to the essential condition of the usufructuary's right. For produce (except the young of animals D. XXI. 1. l 28. pr.; below l 69; l 70. § 4) only becomes his by his own act: *Fructus fructuarii non fiunt, antequam ab eo perciperentur, ad bonae fidei autem possessorem pertinent, quoquo modo a solo separati fuerunt* (D. XXII. 1. l 25. § 1; below l 12. § 5). *Percipere, perceptio* are the technical words for gathering (fruit), getting into possession, &c., e.g. of getting in a vintage (D. XXIV. 3. l 7. § 2); of a creditor getting payment of a portion of his debt (D. XIII. 7. l 22. pr.); of an agent receiving interest due to his principal (D. III. 5. l 19. § 4); of freedmen getting allowances for food and clothing from the heir (D. XXXIV. 1. l 4. pr.), &c. On the question what amounts to gathering see D. VII. 4. l 13; VI. 1. l 78.

**ipsius fructus est**] Who or what is *ipsius*? Is *fructus* genitive or nominative? I incline to translate 'is produce of the farm'. But other translations are possible, e.g. 'is of (i.e. included under) actual produce'; or 'is fruit belonging to him (i.e. usufructuary)'. For *fructus* as genitive cf. D. XXII. 1. l 26. The meaning is much the same, however the words be taken. The last translation is favoured by Bas. ἀναγκάζεται ὁ τὴν χρῆσιν ἔχων καὶ γεωργεῖν τὸν ἀγρόν· αὐτῷ γὰρ διαφέρει τὰ ἐν αὐτῷ γινόμενα καὶ τὰ ἐξ αὐτοῦ δυνάμενα λαμβάνεσθαι, where I take the first αὐτῷ to be the fructuary. (Steph. and the other scholiasts are lost here.)

**sic tamen ut b. u. arb. fruatur**] 'with the limitation however that he must take the produce in the way a good man would think right'.

**boni uiri arbitrato**] This expression is frequently used as a standard of proper conduct or fair judgment. It does not strictly mean 'subject to



a good man's arbitration', but 'as a good man would judge fit'. The bond to be given by the usufructuary contained it (quoted above on 17. § 2 *reficere*). Cf. D. III. 3. 11 77, 78 *omnis qui defenditur, boni uiri arbitrātū defendendus est. Et ideo non potest uideri boni uiri arbitrātū litem defendere is, qui actorem frustrando efficiat, ne ad exitum controuersia deducatur*; XVIII. 1. 1 7. pr.; XIX. 2. 1 24. pr. *Si in lege locationis comprehensum sit, ut arbitrātū domini opus adprobetur, perinde habetur ac si uiri boni arbitrium comprehensum fuisset; idemque seruatur, si alterius cuiuslibet arbitrium comprehensum sit: nam fides bona exigit ut arbitrium tale praestetur, quale uiro bono conuenit*; XXVI. 7. 1 47. § 1; XLVII. 10. 1 17. § 5 (of punishing a slave) *ait praetor 'arbitrātū iudicis': utique quasi uiri boni, ut ille modum uerberum imponat*; 1 17. § 22. Compensation for any damage done by or to contractors for picking olives &c. was according to Cato's *formulae* to be made *uiri boni arbitrātū* Cato *R. R.* 144, 145, 149. The mode of applying such a standard is often of course subjecting the matter to the arbitration of a good man. Cf. D. XVII. 2. 11 76—78; XL. 5. 1 47. § 2; and Voigt *Ius naturale*, I. pp. 608 foll.

**recte colere**] *recte* is very common in the law-writers, and means 'duly', 'in accordance with right', legally considered. Thus *recte agere*, 'to have good right of action'; *a Maevio non recte petitur* (D. XLV. 1. 1 116), 'an action does not lie against Maevius'; *recte soluere* (D. XLVI. 3. 11 106, 108) 'to make a legally good payment'; *uia recte constituta*, 'a right of road duly created'; *recte exheredari*, 'to be duly disinherited', i.e. the disinheritance is valid; *recte dicit* is right in saying; i.e. lays down good law. So in formal covenants; Ulpian says, *Haec uerba in stipulatione posita 'eam rem recte restitui' fructus continent: recte enim uerbum pro uiri boni arbitrio est* (D. L. 16. 1 73), i.e. when a man stipulates for the due restitution of a thing, the stipulation carries with it not only the thing but the fruits, i.e. all that fairly belongs to it (cf. D. VI. 1. 1 20). *Uiri boni arbitrio* is in effect only an expansion of *recte*. Cf. below 1 13. § 8 *non recte nec ex boni uiri arbitrātū facturum, si* &c. with a reference doubtless to the usufructuary's bond; Cato *R. R.* 145 *oleam faciundam hac lege oportet locare: facito recte arbitrātū domini aut custodis qui id negotium curabit...si quid redemptoris opera domino damni datum erit, uiri boni arbitrātū deducetur*; ib. 149. § 2; Varr. *R. R.* II. 2. § 6 *Emtor stipulatur prisca formula sic: 'illasce oues, qua de re agitur, sanas recte esse, uti pecus ouillum quod recte sanum est, extra luscam surdam minam (id est, uentre glabro), neque de pecore morbooso esse, habereque recte licere, haec sic recte fieri spondesne?* Corn. I. 13. § 23 *testamentum ipso praesente conscribunt, testes recte adfuerunt*. Cic. *Top.* 4. § 21 *Pugnat enim recte accipere et inuitum reddere*. In a purchase-deed from a Transylvanian wax tablet (*Corp. I. L.* III. § 59; Bruns p. 207), in case of eviction *quominus emptorem uti frui habere possidereque recte liceat* (i.e. preventing the purchaser from being allowed duly to use, enjoy, have, and possess), the purchaser stipulates *tantam pecuniam probam recte dari*, i.e. for so much good money to be duly given i.e. given in such

way as the law requires. See other deeds in Bruns pp. 202, 206, 208, &c., in some of which *recte* is denoted, like other words of common form, by its initial (*R*) only. So *R. R.* for *recte recipitur*, 'reservation is duly made' (Val. Prob. p. 146 Krüger's ed.); *R. R. P.* for *rebus recte praestari* (ib. p. 147).

This last covenant (*R. R. P.*) is several times mentioned in the Digest in the form *his rebus recte praestari* (VI. 1. 1 19; XXI. 1. 11 21, 22; L. 16. 1 71); where we have either (*a*) an antique use of *praestare* as intransitive with *his rebus* as a dative, 'that a guaranty is given for these things', or (*b*) *his rebus* is ablative, 'on these accounts liabilities be duly made good', 'in these respects a guaranty is duly given' (comp. *eâ re, quâ re*, &c.). Huschke (*Pandektenkritik* p. 44) translates *dass dafür das Erforderliche geleistet werden soll*. So in Varro's formula *illosce boues sanos esse noxisque praestari*, 'that these oxen are sound, and that a guaranty is given for any damage they have done' (Varr. *R. R.* II. 5. § 11: also II. 4. § 5). But the ablative is harsh, and the former explanation is more probable. The same meaning is expressed in D. VI. 1. 1 58 *si quid ob eam rem datum esset, id recte praestari*. So in the common form: e.g. *Haec sic recte dari fieri praestarique, stipulatus est Licinius, spondit Irene* (Bruns p. 202: cf. 201, 210).

§ 1. **si apes in eo fundo sint**] This does not refer to a chance settlement of bees on the estate, as in D. XLI. 1. 1 5. § 2 (Gaius), but to hives of bees regularly kept on the estate. Bee-culture was a usual part of farming. See Varr. *R. R.* III. 16; Verg. *Georg.* IV.; Colum. IX. 2 sqq. So bees were reckoned in a legacy as part of the *instrumentum fundi, si redditus ex melle constat* (D. XXXIII. 7. 1 10).

§ 2. **lapidicinas**] See below 1 13. § 5 where the right of the fructuary to open new stone quarries is treated, and affirmed, if such opening is consistent with proper management of the estate. The same question arises in the case of a dowry estate (*fundus dotalis*). The husband is entitled to cut stone in quarries already opened (D. XXIV. 3. 1 8), and, even where he has himself opened them, can claim all stone cut and lying on the place at the time of a divorce. Whether he could also claim reimbursement of his expenses was a disputed point, the later opinion being that he could, if the quarry was a continuing source of profit (XXIII. 5. 1 18. pr.; XXIV. 3. 1 7. § 13). D. XXIII. 3. 1 32 relates to stone which from special circumstances was not *in fructu*.

As to the form of the word, theory is clear for *lapidicinae*, the omission of the final letter (or syllable) of the stem *lapid-* being supported by analogy (e.g. *homi-cidium* for *homini-cidium*, *uene-ficium* for *ueneni-ficium*, *vulni-ficus* for *vulneri-ficus*, *foedi-fragus* for *foederi-fragus*) and being less likely to conceal the derivation of the word than the omission of *d* from *caedere*, which would leave only one consonant of the verbal root. *Lapici-dinae* is found in Plaut. *Capt.* 944 (without variation in MSS.); Varr. *R. R.* I. 2. § 23. In inscriptions: *lapicaedinis Lex Metall. Vipasc.* 48 (ap. Bruns p. 144); and *Inscr.* 2774 Wilm.; *lapicidinis* ap. Wilm. 2771 not. 6;

*lapicidinarius* 1376 Wilm. But *lapidicinae*, Cic. *Div.* i. 13. § 23 (except in Cod. V. *a secunda manu*); Plin. xxxvi. §§ 14, 15, 125, 168 (in all or the best of Detlefsen's mss.); Paul. Diac. p. 118, ed. Müller; and in all the passages of the Digest (see above; also xxvii. 9. 1 3. § 6; xviii. 1. 1 77. The grammarian Consentius (v. p. 391 Keil) speaks of both forms as right. *Lapicida* (Varr. *L. L.* viii. § 62; Plin. *H. N.* iii. § 30; vii. § 195) confirms the propriety of the spelling *lapicidina*.

**cretifodinas**] 'chalk quarries'. Cf. D. xix. 5. 1 16. pr. Chalk was used for various purposes; in its natural state, for manure (Varr. i. 7. § 8); and burnt to lime (1 12. pr.), for mortar (Cato *R. R.* 14, 15; Vitruv. ii. 5). Chalk was also used for whitening clothes (Plin. xxxv. § 196); and *creta figularis* (also called *argilla*, 'china clay') for pottery (Col. iii. 11. § 9).

**harenas**] Sand was especially used for mortar (Vitruv. ii. 4). The right of taking sand and other materials was sometimes imposed as a servitude in favour of neighbouring estates (D. viii. 3. 1 6. § 1; cf. 1 5).

**quasi bonum patrem familias**] *quasi* is often used as a mere conjunction joining like parts of a sentence. See my *Gram.* § 1583; 1021 a; and for the use of the accusative (*patrem*), rather than a fresh sentence, compare § 1269. For the meaning of *quasi* see below 1 13. § 3 and § 8.

This comparison is a mode of expressing 'rightly', 'properly', similar to *boni viri arbitratu* (above 1 9. pr.). Compare the terms of the bond to be given by the usufructuary (D. vii. 9. 1 1. § 3, quoted above on 1 7. § 2) with Paul. *Sent.* iii. 6. § 27 *usufructu legato, de modo utendi cautio a fructuario solet interponi, et ideo, perinde omnia se usurum, ac si optimus paterfamilias uteretur, fideiussoribus oblatis cauere cogitur*. So below 1 65 *debet enim omne quod diligens paterfamilias in sua domo et ipse facere*. Cf. Colum. ix. 1. § 6 *Contentus non debet esse diligens paterfamilias cibis quos suapte natura terra gignit*. *Paterfamilias* legally was anyone who was not in *potestate alterius* whether he had or had not children, and whether of full age or not (D. l. 16. 1 195. § 2). Hence it was used of anyone who had independent authority either over persons or things. See below 1 13. § 5.

§ 3. **sed si**] Mommsen suggests '*sed et si*'. The omission of '*et*' after *set* (or *sed*) is possible enough; but it is not necessary to alter the text. A condition may be an extreme case without a writer always denoting it as such. Cf. D. xix. 1. 1 1. § 1 (where Haloander would insert *et*); xlv. 1. 1 83. § 6, where Mommsen again suggests the insertion. For the general law in this matter, see note on § 2 *lapidicinas* (p. 69).

**metalla**] includes mines and quarries, and is also applied to the ore and stone extracted. Varr. *R. R.* 1, 2. § 22 *ac magis putem pertinere (ad agriculturam), figlinas quemadmodum exerceri oporteat quam argenti fodinas, aut alia et alia metalla, quae sine dubio in aliquo agro fiunt* (where *alia et alia* is used in reference to the old derivation of *metalla*, cf. Plin. xxxiii. § 96 *ubicunque una inuenta uena est, non procul inuenitur alia...unde metalla* [μετ' ἄλλα] *Graeci uidentur dixisse*). Cf. *infr.* 1 13. § 5 *proinde uenas quoque lapidinarum et huiusmodi metallorum inquirere poterit*. It



is used of the mines, Liv. XLV. 29. § 11; Plin. XXXIII. *passim*; Cod. Theod. x. 19. 1 1; of the ore Plin. XXXIII. § 59. Condemnation to work in the mines was a frequent punishment of criminals, D. XLVIII. 13. 1 8. § 1; 19. 1 8. §§ 4—12.

**inuenta**] ‘discovered’ commonly applied to finders of treasures, e.g. D. XLI. 1. 1 63. pr.; XXIV. 3. 1 7. § 12. So of finding stone-quarries, &c. ib. § 13.

**cum totius agri, &c.**] The bequest being a bequest of the usufruct of the land without limitation, it will cover unknown as well as known produce.

**relinquatur**] ‘left by will’. This use of *relinquere* is common and arises naturally from its proper meaning of ‘leave behind’. A man on death leaves behind his children and his property: he leaves behind his property for his children or for others according to the rules of law. As the law gives him the right of willing who should enjoy it, *relinquere alicui* comes to be understood as equivalent to *dare alicui testamento*. Comp. Plaut. *Aul.* 951 *Is quoniam moritur, ita audio ingenio fuit, numquam indicare id filio uoluit suo, inopemque optavit potius eum relinquere quam eum thesaurum conmostraret filio. Agri reliquit ei non magnum modum.* *Relinquere* is used of inheritances, e.g. Gai. III. 70 *si cum liberis suis etiam extraneum heredem patronus reliquerit*; D. II. 14. 1 40. § 3 *heredibus testamento relicto*; of legacies, e.g. Gai. II. 197, &c., and of giving by will freedoms (D. XL. 4. 1 41. § 2), and releases (D. XXXIV. 3. 1 3. § 3), but especially in describing *fideicommissa*, probably because neither *instituere* (*heredem*), nor *dare* (*testamento*), nor *legare* were suitable. See Gai. II. 262—264, 269—274; Paul. *Sent.* IV. 1. But *relinquo* was not a good technical word to create a *fideicommissum* (Paul. *Sent.* IV. 1. § 6).

§ 4. **huic uicinus tractatus est**] The question raised about the right of a usufructuary to the produce of mines discovered after his usufruct commenced, is one of the same nature as that of his right when the estate receives an accretion by the action of a river, &c. *Huic* is the question just treated; *tractatus*, that going to be mentioned.

**uicinus**] ‘resembling’, ‘analogous’. Cf. D. XIX. 4. 1 2 *Aristo ait, quoniam permutatio uicina esset emptioni, &c.*

**in eo quod accessit**] ‘in the case of an accessory’. A common use of the preposition, e.g. D. II. 14. 1 27. § 2 *idem dicemus et in bonae fidei contractibus*.

*Accedere, accessio*, are used in the law-writers frequently of such appurtenances or accessories as share the legal fate of their principal (*accessio cedit principali*). It is especially used to include accessions from without, as distinguished from growths. The heading of D. XXII. 1 is *de usuris et fructibus et causis et omnibus accessionibus et mora*. Such accretions are buildings erected on land, trees planted, gradual deposits on a river bank (as here), writing on paper, the gold setting of a jewel, embroidery on dresses (D. VI. 1. 1 23; Gai. II. 70 sqq.). But not only such secondary

objects as are in physical connexion with a thing (to which class of appurtenances modern lawyers would confine the term in its strictest use, e.g. Wächter *Pand.* § 65; Böcking *Pand.* §§ 78, 81) are called accessories, but even such as the terms of a bargain or the intention of a testator may have made accessory (D. XXI. 1. 11. § 1; 132; 133; xxx. 1 63 &c.; xviii. 1. 134. pr.). The use of these words in reckoning the length of time necessary for usucapion (D. XLIV. 3. 11 14—16), and in speaking of sureties (Gai. III. 126) is not here relevant. In Cato, *R. R.* 144—146, and Cic. *Verr.* III. 32, 36, 49, 50 and others, *accessio* is used of an 'additional' payment or commission.

**alluvionis]** The meaning of *alluvio* is given clearly by Gai. II. 70 *Sed et id, quod per alluvionem nobis adicitur, eodem iure* (i.e. *iure gentium*) *nostrum fit: per alluvionem autem id videtur adici, quod ita paulatim flumen agro nostro adicit, ut aestimare non possimus quantum quoquo momento temporis adiciatur.* The question was mooted whether if a river had gradually encroached on one bank and left some accretions on the other, the owner of the land encroached on could not claim the accretions, as if they had been simply moved by the river from one side to the other. But it was answered, All we know is some particles were washed off, some particles were washed on, but it is not possible to identify the one with the other (Frontin. *de controu. agr.* p. 50, ed. Lachm.). It was competent to each riparian owner to secure his own bank, provided he neither impeded navigation nor unfairly altered the set of the stream, D. XLIII. 12. 1 1. § 16; 13. § 6; 15; Hygin. p. 124; Sic. Flac. p. 150 (Grom. ed. Lachmann). When the land in question was *ager limitatus*, i.e. land publicly surveyed and set out by bounds, the extent of land belonging to each person was defined by the bounds, and accretions beyond these bounds did not belong to these persons, but were open to be seized by the first occupant or to be claimed by the state (D. XLI. 1. 1 16; cf. XLIII. 12. 1 1. §§ 6, 7, and see Rudorff *Grom. Inst.* p. 452). Such accretions were so unstable, that Theodosius directed that they should be entered separately in the census and not subjected to taxes (Theod. *Nov.* II. 20, also in Grom. p. 273, ed. Lachm.). The rights to islands created by the river changing its course, or to a river-bed left dry, or to land bodily moved by a violent mountain-torrent, or to land temporarily covered by an inundation are all different from the case of alluvion. The Nile and the rivers of North Italy, especially the Po, often led to these questions being raised. (Cf. Frontin. p. 50; Hygin. p. 124; and Theod. *Nov.* quoted above.)

Godefroï sees in our passage a correction of Paul. *Sent.* III. 6. § 22 *Accessio ab alluvione ad fructuarium fundum* (omit *fundum* with Krüger, or read *fundi* with Huschke), *quia fructus fundi non est, non pertinet.* But that relates to the property in the *alluvio*, our passage to the usufruct of it.

**si insula in flumine nata sit]** According to Gaius (D. XLI. 1. 1 7. § 3) this was a frequent occurrence. See also of same title 1 29; 1 30; 1 56; 1 65.

§§ 1—3. The case here treated of is the third of those named in 130. § 2. *Tribus modis insula in flumine fit, uno, cum agrum qui aluei non fuit amnis circumfluit; altero, cum locum qui aluei esset siccum relinquit et circumfluere coepit; tertio, cum paulatim colluendo locum eminentem supra alueum fecit et eum alluendo auxit.* The law assigned such an island to those, whether one or more, who owned the opposite banks if the island was in the centre, but if not, then to the owner or owners of the nearer bank, and in proportion to the length of opposite bank owned by each (ib. 129). A floating island not cohering to the bottom of the river was regarded as part of the river and therefore public (ib. 165. § 2).

**esse enim ueluti proprium fundum]** ‘for it forms, Pegasus thinks, a kind of special estate’, is not a part of another estate but an estate in itself. For this use of *proprium* cf. Julian in D. xli. 4. 17. § 1 *Si fundum Cornelianum pro emptore longa possessione capiam, et partem ex uicini fundo ei adiciam, ... partes quae emptioni fundi (emptione fundo?) adiciuntur propriam ac separatam condicionem habent, et ideo possessionem quoque earum separatim nancisci oportet.*

**ueluti]** ‘as it were’ is here used simply to qualify a somewhat too strong expression. Cf. Gai. i. 111 *Quae enim ueluti annua possessione usucapiebatur, in familiam viri transibat*; so also *uelut*, D. v. 5. 11 *Quos praetor uelut heredes facit, hoc est, quibus bonorum possessio data est.* Gai. ii. 104 *Aere percutit libram idque aes dat testatori uelut pretii loco.* So frequently *quasi*, cf. 113. § 3. (Another frequent use of *ueluti* or *uelut* is ‘as for instance’, e.g. Gai. i. 114, &c.)

**non est sine ratione]** ‘there is reason in this view’. What is added (as by *alluuiio*) so gradually that its addition is not to be perceived or dated, may properly be considered part of the natural growth of the property over which the usufructuary has rights: but what in its very origin is quite separate cannot be regarded as a product, or as included in the original creation of the right.

**nam]** Instead of giving the principle of the distinction, a statement of the law is given embodying the principle on which it is based.

**latet]** The mss. have *latitet*, apparently without variation. But the mood is wrong, and inconsistent with *apparet* as well as with its apodosis *augetur*; and the word *latitare* appears elsewhere to be used only of purposed concealment, ‘keeping out of the way’, e.g. D. ii. 4. 119; iii. 3. 121; xl. 5. 111; 128. § 1; xlii. 4. 12. § 2; 17. § 4, &c.; Gai. iii. 78; on the other hand Justinian *Inst.* ii. 1. § 20 has *est autem alluuiio incrementum latens*; and *latet* is both a suitable word and accounts for the final syllable in the ms. *latitet*. I scarcely think any justification can be obtained for *latitet* from Gaius’ words, ii. 70 *Ita paulatim adicitur ut oculos nostros fallat.*

**et usus f. augetur]** ‘the usufruct also is increased’, i.e. as well as the *proprietas*.



**fructuario non accedit]** 'it is not an accretion for the benefit of the usufructuary'. Just above we have the abstract right put in the dative, *proprietati accedit*. The meaning is the same.

§ 5. **aucupiorum et uenationum reditum]** 'the returns from fowling and hunting', i.e. the profits of them. Paul. *Sent.* III. 6. § 22. The game itself is wild and the property of him who catches it, whether he have an interest in the land or not; though a stranger may of course be prevented from trespassing for this as for any other purpose (D. XXI. 1. 13). But the facilities which the estate may have for catching game are part of the usufruct, and, if they lead to profit, the profit for the time belongs to the usufructuary. Some estates had staffs of fowlers and hunters regularly kept. Cf. D. XXXIII. 7. 1 12. §§ 12, 13; ib. 1 22.

§ 6. **seminarii]** 'a nursery bed'. Cf. D. XXV. 1. 1 3 *Si (uir in prae-dio dotuli) uites propagauerit uel arbores curauerit uel seminaria pro utilitate agri fecerit, necessarias impensas fecisse uidebatur*, XLVII. 7. 1 3. § 4; Cato *R. R.* 46; 48. § 1. They were used for vines (Col. IV. 16. § 1; called also *uitiarium*, Cato *R. R.* 40. § 1; 47; Col. III. 4. § 1; Plin. XVII. 164); for olives (Varr. *R. R.* I. 47; Col. V. 9. § 1); figs (Varr. *ib.*); elms, beeches &c. (Col. V. 6. § 1; § 5). The produce of this, as well as of other parts of the estate, belongs to the fructuary. The produce would be either fruit itself or young plants or cuttings.

**ita ut]** The MSS. have *ita tamen ut*. Mommsen suggests the omission of *tamen*. It may easily have come here from the last syllable of *ita*, or from the *debet tamen* shortly after, but is not appropriate here, where the nature of the right is given, not a restriction as in 1 7. § 2 *hactenus tamen ut*; 1 9. pr. *sic tamen ut*.

**seminare]** The Lexx. give only the meaning of 'sow', referring to Col. II. 4. § 4; § 11; 8. § 1, § 4, where grain is spoken of. But it is also used of planting (v. 10. § 2); and *semen* is quite general. Cf. Cato *R. R.* 46; Varr. *R. R.* I. 39. § 3 where four kinds of *semina* are named, seeds, quicksets, cuttings, and grafts; Col. V. 5. § 6 *De qualitate seminum inter auctores non conuenit. Alii malleolo protinus conseri uineam melius existimant, alii uiuiradice*, &c. The produce of a nursery would naturally be used rather for planting, &c. than for sowing.

**paratum]** 'ready at hand'. Col. V. 5. § 1 *Qui uolet frequens et dispositum arbustum paribus spatiis fructuosumque habere, operam dabit ne emortuis arboribus rareseat, ac primam quamque senio aut tempestate afflictam submoueant, et inuicem nouellam sobolem substituant. Id autem facile consequi poterit, si ulmorum seminarium paratum habuerit*. For *paratus* cf. Plin. *Ep.* II. 17. § 25 *Quocumque loco moueris humum, obuius et paratus humor occurrit*.

**quasi instrumentum agri]** 'as a kind of stock or working-plant of the land'. The *instrumentum fundi* is that with which it is *instructus* 'furnished'. It is defined (for a legacy) by Ulpian after Sabinus, *In instrumento fundi*

*ea esse quae fructus quaerendi cogendi conseruandi gratia parata sunt* (D. xxxiii. 7. 18. pr.). It consisted of three classes of objects, slaves, animals, implements; called by some *instrumenti genus uocale, semiuocale, mutum* (Varr. *R. R.* i. 17. § 1). Thus it comprised the slaves employed on the estate, their wives and families; the plough-oxen and the herds kept to make manure; farming-implements, presses, vats; if there are pastures, the sheep and shepherds; if hunting and fowling, the hunters, fowlers, dogs and nets; also beasts of draught, carts, boats, casks, employed to export the produce; and though many wished to confine the term to the more permanent things (*apparatus rerum diutius mansurarum*), others e.g. Servius and Ulpian, included wine and corn prepared for the labourers, and seed for sowing (D. xxiii. 18.—12. § 15; Paul. *Sent.* iii. 6. § 34 sqq.). Things attached to the ground, as reed-beds, withy-beds, trees for stakes, were not comprised in the *instrumentum fundi* because they were part of the *fundus* itself (ib. 12. § 11). Hence in our passage the nursery-beds are called *quasi instrumentum*. The term *fundus instructus* in a legacy was eventually held to be somewhat wider than *fundus cum instrumento* (12. § 27; 15).

**ut—restituatur]** The usufructuary must keep the nurseries standing, so that on the expiration of the usufruct they may be there for the owner. The usufructuary has only the use and produce and is bound to renew.

§ 7. **instrumenti fructum habere debet]** A legacy of an estate did not carry with it the working-plant, unless this was expressed, e.g. *fundum cum instrumento*, or *fundum et instrumentum*, or (a still larger term) *fundum instructum*, or (still larger term), *ut optimus maximusque est*, or *uti possedi* (D. xxxiii. 10. 14; 7. 15; 12. § 27; 120. § 9; 122. Paulus *Sent.* iii. 6. § 34 appears either to be in some way mutilated, or to represent a divergent opinion. Cf. Huschke *ad loc.*). A legacy of the usufruct of an estate did (according to our passage and below 15. § 6) carry with it the usufruct of the working-plant. In D. vii. 8. 16. pr. a legacy of the use of an estate *ut instructus esset* is spoken of.

**facultatem]** ‘the power’, i.e. ‘the legal power’ or ‘right’. So Gai. ii. 163 *Si adierit (hereditatem), postea relinquendae hereditatis facultatem non habet*; D. xxxv. 2. 11. pr. *Lex Falcidia liberam legandi facultatem dedit usque ad dodrantem* (in the law itself the words are *iūs potestasque esto*), xxviii. 7. 122; xxix. 2. 128. In D. xxxix. 2. 118. § 2 a usufructuary is said to have no right to security for possible damage to his own house from that of which he has the usufruct, *quia reficiendi habet facultatem*; *nam qui uiri boni arbitratu uti deberet, reficiendi quoque potestatem consequitur*, where legal power is at least principally regarded. The more frequent meaning of *facultas* is ‘means’, ‘possibility’ ‘(non-legal) power’, e.g. Ulp. 24. § 26 *Ususfructus legari potest iure civili earum rerum, quarum salua substantia utendi fruendi potest esse facultas*; D. iii. 3. 173 *Non optulit pecuniam. Quid si tunc facultatem pecuniae non habuit?* x. 4. 15.

§ 6; XLV. 1. 1137. § 4, &c. So *facultates* often in the sense of 'pecuniary means', e.g. Gai. II. 154 *Qui facultates suas suspectas habet*.

**nam et si]** Another analogous case is introduced as an argument. The working-plant is in the same relation to the estate, as is a wood not part of the estate, but utilized in connexion with it. This passage is in the Vat. Fr. § 70, but so mutilated that no help can be derived from it.

**et sit ager unde, &c.]** 'and if there be land whence the owner used to take poles for the use of the estate in question'. The *ager* is clearly not part of the *fundus*. This interpretation, as old as Accursius, is confirmed by the distinguishing addition to *fundum*, viz. *cuius usus fructus legatus est*, and by Steph. *ἐνθα οὐσούφρουκτος ἀγροῦ ληγατέυεται καὶ ἕτερός ἐστιν ἀγρός, ἐξ οὗ σύνθητες ἦν τῷ προπριεταρίῳ πάλους τινάς... λαμβάνειν καὶ εἰς τὸν ἀγρὸν οὗ τὸν οὐσούφρουκτον ἐληγάτευσσε μεταφέρειν*. Cf. Donell. *Iur. Civ.* x. 7. § 9; Rudorff's note *n* to Puchta's *Cursus* § 255; Vangerow, *Pand.* § 344, Anm. I. 1 (I. p. 735). A case in point is found in an inscription at Petelia (Strongoli) *Corp. I. L.* x. No. 114.

**palo]** 'poles, stakes', used for fences, Varr. *R. R.* I. 14. § 2; or to train the vines to, Varr. *R. R.* I. 8. § 4; Col. IV. 12; 13; Plin. XVII. § 174. They were round sticks sharpened at the end, and opposed to *ridicae* which were cleft from the bulk (cf. Colum. XI. 2. § 11). See below on I 10. The singular number is often found for the generic name of articles of food or other daily purposes. So *salice*, *harundine* in next line and *caesae harundinis uel pali compendium* in I 59. § 2; *uestis* in I 15. § 5. Cf. Cic. *Sen.* 16 *Uilla abundat porco, haedo, agno, gallina, lacte, caseo, melle*.

**pater familias]** i.e. the testator, spoken of as *pat. fam.* in his capacity of absolute owner of the estate. So just below; and see note on I 13. § 5.

**salice]** 'willow', 'osier', 'withy' used for vine-poles, ties, basket-work, &c.; **harundine**, 'reed' for cross (and other) poles for vines. Cato *R. R.* 6. §§ 3, 4; 9; 33. § 5, &c.; Varr. *R. R.* I. 23. § 4; Plin. XVI. §§ 173—177; XVII. §§ 141—146; 174; Colum. IV. 12; 17; 30 *Quoniam constituendis colendisque uineis quae uidebantur utiliter praecipi posse disseruimus, pedaminum iugorumque et uiminum prospiciendorum tradenda ratio est. Haec enim quasi quaedam dotes uineis ante praeparantur...Quare salices uiminales atque arundineta vulgaresque siluae uel consulto consitae castaneis prius facienda sunt. Salicum uiminalium, ut Atticus putat, singula iugera sufficere possunt quinque et uigenis ligandae uineae, arundineti singula iugera uigenis iugandis; castaneti iugerum totidem palandis quot arundineti iugandis*. (The word *dos* was applied by analogy to denote the *instrumentum* of a vineyard as above (cf. D. XXXIII. 7. I 16. § 1), and in Col. III. 3. § 5; § 8; and the *instrumentum* of a farm which was let with the farm itself, D. XXXIII. 7. I 2. § 1; I 20. § 3; XLVI. 1. I 52. § 1; Cod. Theod. v. 14. I 4; called in Greek *ἐνθήκη*, D. XXXI. I 34. § 1; XXXII. I 68. § 3; Cod. Theod. v. 13. I 18. *Dos* was applied also to the corporate property of the Bakers' Company, Cod. Theod. XIV. 3. I 13; hence *fundi dotales* ib. I 7.)



**hactenus uti posse, ne ex eo uendat]** ‘may use them, but is not allowed to sell of their produce’. The case is different however if the usufruct of a withy-bed or of a lopping-plantation or reed-bed is specifically bequeathed him. Then he is entitled to the produce as in any other case of usufruct, and can deal with it as he likes, his conduct being regulated only by the general duty to farm in a husbandlike manner.

**siluam caeduam]** ‘a coppice’ (from Fr. *couper*, to cut) or ‘underwood’. Gaius, in D. L. 16. 1 30, pr., says, *silua caedua est, ut quidam putant, quae in hoc habetur ut caederetur: Seruius eam esse quae succisa rursus ex stirpibus aut radicibus renascitur*. Modern lawyers often speak of it as having a wider and a narrower meaning, the wider meaning, given first by Gaius, including any woods intended for felling; the latter meaning, that of Servius, being only coppice-wood. (See e.g. Hoffmann *Serv.* § 41; Vangerow *Pand.* § 344, Anm. 1.) I do not think it is necessary to suppose the meanings to be different; but Servius gives a more precise definition. For *silua caedua* is generally used in a context which best suits coppice-wood, and nowhere, so far as I see, where it must mean timber plantation. Cf. l 10; l 48. § 2; VIII. 3. l 6. § 1; IX. 2. l 27. § 26; XVIII. 1. l 80. § 2; XXIV. 3. l 7. § 7; L. 15. l 4. pr. In XVIII. 1. l 40. § 4 *arundinem caeduam et siluam in fructu esse respondit, et* should be supplied before *caeduam* (so Cujac.); XXIV. 3. l 7. § 12 *puto autem si arbores caeduae fuerunt uel gremiales, dici oportet in fructu cedere* Haloander suggests *cremiales*, i.e. for burning. Stephanus interprets our passage of coppice (referring to the second meaning given by Gaius), *μητρικὴ ὕλη ἐστὶν, ἥτις μετὰ τὸ τηθῆναι πάλιν ἐκ τῶν ῥιζῶν ἢ ἐκ τῶν κλάδων φύει καὶ αὖθις ἀναδίδωσι*. Cato, *R. R.* 1. § 7, places in order of profitableness the various kinds of land: *uinea est prima si uino multo siet; secundo loco hortus irriguus; tertio salictum; quarto oletum; quinto pratum; sexto campus frumentarius; septimo silua caedua; octauo arbustum; nono glandaria silua* (quoted by Varr. *R. R.* l 7. § 9; Col. III. 3. § 1). Varr. *R. R.* I. 23. § 5 *Alio loco ut seras ac colas siluam caeduam, alio ubi aucupare*. Pliny XIII. § 39 *Sunt et caeduae palmarum quoque siluae rursus germinantes ab radice succisae*; and (after closing his account of fruit trees) XVII. § 141 *restat earum (arborum) ratio, quae propter alias seruntur ac uineas maxime caeduo ligno. Principatum in his obtinent salices*. Then, after mentioning *harundo* (§ 144), *castanea*, praised as *regeneratione caedua uel salice lactior* (§ 147: cf. Col. IV. 33. § 1 *castanea post quinquennium caesa more salicti recreatur*), and *aesculus* (§ 151), he proceeds *praeter haec sunt caedua quae diximus, fraxinus, laurus, persica, corulus, malus*. In fact a *silua caedua* was a frequent constituent of an ordinary farm, supplied it with poles and stakes, and was in regular cutting and a source of use and periodically recurrent profit as a crop. (It was cut at longer intervals than a year, D. XXIV. 3. l 7. § 7.) Timber, so far as was required for the repair of the buildings, was grown along the roads (Cato 6. § 3; Varr. *R. R.* I. 24. § 3). The mountain timber-forests were hardly ordinary subjects of usufruct. If such a usufruct was granted,

fellings at regular intervals would no doubt be intended and properly exerciseable. But in an ordinary usufruct of a farm express words would naturally be required to give a usufructuary a right to fell timber plantations. See l 10. The Scholiast Dorotheus on Bas. xxviii. 8. l 7=D. xxiv. 3. l 7. § 7 however understands the expression of felled timber, explaining τῆς τεμνομένης ὕλης by τῶν ἐργασίμων μεγάλων ξύλων τῶν μετὰ τὸ κοπήναι ἀποτιθεμένων ἐν τῷ ὄρει ὥστε ἀποβαλεῖν τὴν ὑγρότητα. And Pliny, *Ep.* iii. 19. § 5, speaks of woods producing timber being a source of regular profit, *Agri constant campis vineis silvis quae materiam et ex ea redditum, sicut modicum, ita statum praestant*. But Pliny may mean by *materia* poles and stakes. In English law 'Every tenant for life unless restrained by covenant or agreement has the common right of all tenants to cut wood for fuel to burn in the house, for the making and repairing of all instruments of husbandry, and for repairing the house and the hedges and fences, and also the right to cut underwood and lop pollards in due course. But he is not allowed to cut timber'. Josh. Williams, *Real Property*, p. 23, ed. 1880; Coke, *Litt.* p. 53. By the *Code Napoleon* § 591 the usufructuary can cut timber in forests which are regularly cut, but must follow the precedent of the former proprietors as regards quantity and times.

**sicut pat. fam. caedebat**] i.e. 'at such intervals of time and in the like quantities'. It is not clear whether Trebatius is speaking of the grant of a usufruct in express terms of a coppice or reed-beds, or of the usufruct of an estate having such on it besides other farming arrangements. Probably the doctrine would hold in either case. Heimbach in Weiske's *Rechts-Lex.* xi. p. 8. § 6 apparently takes *pater familias* in the sense in which it is used in § 2. But it can hardly denote here more than 'the former owner', though the usufructuary in this case as in others would of course have to act in a husbandlike manner. On this use of *pater familias* see below note on l 13. § 5 (p. 108).

**licet...solebat**] *Licet* is generally used with the subjunctive in law Latin as well as in other; but occasionally we have the indicative, e.g. D. i. 3. l 31; L. 16. l 58. pr.

**ad modum enim, &c.**] 'we must look to the quantity used, not to the kind of use'. For *modus* and *qualitas* cf. D. xix. 1. l 42 *Si exiguus modus silvae desit et plus in vineis habeat (fundus) quam repromissum est...uideamus ne nulla querella sit emptoris in eodem fundo, si plus inueniat in vinea quam in prato, cum uniuersus modus constat...Rectius est in omnibus supra scriptis casibus lucrum cum damno compensari, et, si quid deest emptori siue pro modo siue pro qualitate loci, hoc ei resarciri*; xviii. 1. l 40. pr.

**l 10. ex silua caedua**] Bas. here and in l 48 has ἀπὸ τῆς καυσίμης, but this is a mistake. Steph. understood it rightly. And so Bas. has τεμνομένη in D. L. 16. l 30 (=Bas. ii. 2. l 20); xxiv. 3. l 7. § 7 (=Bas. xxviii. 8. l 7).

**pedamenta**] 'props'. Cf. Varr. *R. R.* i. 8. § 1 *Quibus stat recta vinea, dicuntur pedamenta: quae transuersa iunguntur, iuga...* § 4 *Pedamentum*

*fere quatuor generum. Unum robustum quod optimum solet afferri in uineam e quercu ac iunipero et uocatur ridica* (cf. D. XLIII. 24. l 11. § 3): *alterum palus e pertica...tertium quod horum inopiae subsidio misit arundinetum; inde enim aliquot colligatas libris demittunt in tubulos fictiles...quantum est pedamentum natiuum eius generis, ubi ex arboribus in arbores traductis uiti-bus uinea fit.* Plin. XVII. § 174 *Pedamenta optima quae diximus* (i.e. chestnut, horse-chestnut, ash, laurel, hazel, &c. §§ 147—151) *aut ridicae e robore oleaeque; si non sint, pali e iunipero, cupresso, laburno, sabuco.*

**ramos ex arbore]** ‘boughs from trees growing in the coppice’. The *pedamenta* would usually be stems growing from the roots or stumps: if there was a large tree, he might cut branches, but to fell the trees themselves was not allowed him.

**in uineam sumpturum]** In a coppice the usufructuary may cut for any purpose, even to sell; in a wood not intended for lopping (e.g. *silua glandaria*, see Cato quoted in note on *silua caedua*) he might cut what was required for the vineyard, but only if he could do so without spoiling the estate. A similar restriction was necessary even in a coppice, if the right was only a rural servitude, not a usufruct (D. VIII. 3. l 6. § 1).

**l 11. si grandes arbores essent]** I understand this to relate to large trees whether in a *silua caedua* or a *silua non-caedua*. A qualification ‘except for the purpose of repairing the farmhouse’ is added in l 12. pr.

**l 12. pr. arboribus euolsis]** ‘pulled up by the roots’, cf. D. XLVII. 7. l 7. § 2. It is difficult to see why *ui uentorum* is not applicable to *euolsis* as well as to *deiectis*. The action of water is the only involuntary agent besides wind that is likely to have upset a tree. Perhaps the explanation is this. Trees could fall either by the roots being pulled up or the stem being broken. Wind or human action is the most common agent in either case. Ulpian was going to speak quite generally (*euolsis uel deiectis*), but remembering the use of *deicere* of men felling trees he has inserted *ui uentorum* before *deiectis*. *Euellere* is also spoken of men’s action as in D. XLVII. quoted above, but men would not pull up timber trees unless when very young and unimportant. For *deicere* cf. l 13. § 4; § 5; l 19. § 1; 6. l 2; XVIII. 6. l 9 *Si ab herede fundi ususfructus petitus sit, qui arbores deieciisset aut aedificium demolitus esset*; XXXII. l 55. § 2; Sic. Flac. p. 144, Laehm. *Si utrisque possessoribus conuenient ut finales arbores deiciant.* See Ulpian, quoted below on *nec materia* (p. 80).

**usque ad usum, &c.]** ‘for his own use and that (i.e. the repair) of the farmhouse only’ i.e. not for sale. *Usque* in this sense, of the extreme limit, is chiefly in expressions of place, time, number or the like, e.g. *usque in diem mortis suae* (D. XXXII. l 35. pr.); *praedia mea omnia quae sunt usque ad praedium quod uocatur Gaas* (ib. § 1); *usque ad partem dimidiam eius numeri manumittere permittitur* (Gai. I. 43). The words *usque ad usum* are confirmed by Vat. Fr. § 71.

**ferre]** ‘carry off’, ‘take’. Cf. l 27. pr.; l 35. § 1; l 42. § 1; D. IX. 2. l 27. § 27 *Si salictum maturum ita, ne stirpes laederes, tuleris, cessare*



*Aquiliam scribit* (where Mommsen favours the reading of the inferior mss. *secueris*); XLVII. 2. l 21. § 5 *Si de naui onerata furto quis sextarium frumenti tulerit*; XLVIII. 13. l 2. Here (compare also *auferret* two lines below) probably in the sense of taking as his share or profit, cf. XVII. 2. l 30 *Mucius scribit non posse societatem coiri, ut aliam damni, aliam lucri partem socius ferat*; Plin. *Ep.* v. 1. § 10 *Tuli fructum non conscientiae modo uerum etiam famae*. But unless taken for such purposes as the repair of the homestead, they apparently belong to the proprietor (l 19. § 1).

**nec materia eum pro ligno usurum]** *materia* is 'timber'; *lignum*, 'firewood'. Ulpian (D. xxxii. l 55. pr.) speaking of legacies says *Ligni appellatio nomen generale est, sed sic separatur ut sit aliquid materia, aliquid lignum; materia est quae ad aedificandum fulciendum necessaria est, lignum quidquid conburendi causa paratum est. Sed utrum ita demum si concisum sit, an et si non sit? Et Q. Mucius refert, si cui ligna legata essent, quae in fundo erant, arbores quidem materiae causa succisas non deberi: nec adiecit, si non comburendi gratia succisae sunt, ad eum pertinere, sed sic intellegi consequens est*. He goes on (§ 2) to point out that if a wood (*silua*) was intended to be cut up for firewood, *silua quidem non cedit, deiectae autem arbores lignorum appellatione continebuntur, nisi aliud testator sensit*. In our passage there is no such distinction of the trees supposed, and therefore the usufructuary is not justified in taking timber trees for firewood, unless he can find no firewood elsewhere.

**si habeat unde utatur ligno]** 'if he have other sources of supply of firewood'.

**alioquin]** 'otherwise' i.e. if this rule does not hold.

**hunc casum passum]** i.e. 'if all the trees on the estate had been torn up or blown down'.

**materiam ipsum succidere]** 'the usufructuary may himself cut timber', i.e. he may not only use what has fallen, but may fell. For *succidere* cf. Col. xi. 2. § 11, speaking of the month of January, *Ridicis uel etiam palis conficiendis idoneum tempus est: nec minus in aedificia succidere arborem conuenit. Sed utraque melius fiunt luna decrescente ab uigesima usque ad trigesimam, quoniam omnis materia sic caesa iudicatur carie non infestari*; Plin. xvi. § 58, &c. See above in note on *nec materia*, &c.

**quantum ad uillae refectionem]** 'as much as is required for the repair of the homestead'. *Attinet* or *pertinet* is understood. So D. ii. 8. l 2. § 4; iii. 3. l 33. pr. The verb is expressed in Gai. i. 73; 157; Ulp. xi. 8.

**calcem coquere]** Lime-burning is described by Cato *R. R.* 38; Vitruv. ii. 5. See above on l 9. § 2 *cretifodinas*.

§ 1. **ad nauigandum]** The mss. have *nauigandum* without *ad*, which is not Latin. Either the insertion of *ad* or correcting *nauigandum* to *nauigatum* is necessary. The former construction is usual in the Digest, e.g. iv. 6. l 35. § 1; xli. 2. l 1. § 11; xlii. 7. l 2. § 1. Mommsen suggests the latter correction.

The purport of the section is that the usufructuary of a ship is within

his right if he send it to sea, even though a storm be impending and the ship be eventually lost. Cf. D. VI. 1. l 16. § 1. Cf. ib. l 62. pr.

§ 2. **ipse frui ea re]** *Frui* is not strictly a technical word. It denotes taking the produce, or, more generally, having the full enjoyment of a thing, e.g. *In ea causa est, ut sine dolo malo in libertate fuerit atque ideo possessoris commodo fruatur* (D. XL. 12. l 12. § 3), and is thus applicable to an owner, or a possessor (Gai. IV. 167), or a tenant. As a purchaser was entitled to have lawful possession (*habere licere* D. XIX. 1. l 1. pr.; l 11. § 8), so a hirer was entitled to have the produce (*frui* D. XIX. 2. l 9. pr.; § 1; l 15. § 1, &c.) e.g. *si domus uel fundus in quinquennium pensionibus locatus sit, ... colonus, si ea frui non liceat, totius quinquennii nomine recte aget, etsi reliquis annis dominus fundi frui patiatur* (D. XIX. 2. l 24. §§ 2—4). But it is also used frequently in the sense of ‘exercising the rights of a fructuary’. So here. The fructuary in time loses his right, if he does not exercise it, but his exercise may be personal by his own enjoyment of the thing, or constructive by allowing another to enjoy. Cf. l 38. It was otherwise with a bare use. That required personal exercise. D. VII. 8. l 8; l 11.

**alii fruendam concedere]** ‘to allow another to enjoy’, or ‘take the produce’. (a) *Concedere* is a general word, e.g. it is used of authoritative permission, Gai. I. 45 *Decem seruorum domino usque ad dimidiam partem eius numeri manumittere conceditur*; of surrendering a debt, D. XXXIV. 3. l 28. § 6 *Seio concedi uolo quidquid mihi ab eo debitum est*; of giving up property, D. XXVIII. 1. l 8. § 1 *Si cui aqua et igni interdictum sit, ... eius bona, quae tum habuit cum damnaretur, publicabuntur, aut, si non uideantur lucrosa, creditoribus concedentur*; of granting a servitude, D. XXXIX. 3. l 17. pr. *Si prius nocturnae aquae seruitus mihi cessa fuerit, deinde postea alia cessione diurnae quoque ductus aquae concessus mihi fuerit, &c.*, where the grant or permission (*concessio*) is distinguished from the formal creation of the servitude by *in iure cessio*. In the same way should be understood the grant of a road (D. XXI. 2. l 46. § 1), of a usufruct (D. XXXIII. 2. l 27), of the right of raising higher a house (D. VIII. 2. l 21), of a right to lead and draw water (ib. 3. l 2), and of several easements (ib. l 20, cf. l 16 of our title), though it is possible that the word in these passages may have originally been *cedere*. Both are found ib. l 14 *Per quem locum uiam alii cessero, per eundem alii aquae ductum cedere non potero: sed et si aquae ductum alii concessero, alii iter per eundem locum uendere uel alias cedere non potero*. For Justinian *cedere* and *concedere* would mean the same.

(b) But this application to the case of granting a servitude is different from its use in our passage. If I have a usufruct, I cannot grant that usufruct to any one so as to create in that person a new usufruct. The usufruct is connected with me, and reverts to the bare owner on my death or on my *capitis deminutio*, &c. But I can grant to another a right to its *de facto* exercise (comp. in English law an estate *pur autre vie*) so long as my title continues. The distinction between the sale (by a usufructuary) of this right, and the sale (by an owner) of a usufruct (created as a conse-

quence of the contract of sale) is neatly put by Paulus (D. XVIII. 6. 18. § 2) *Cum usum fructum mihi uendis, interest utrum ius utendi fruendi quod solum tuum sit uendas, an uero in ipsum corpus, quod tuum sit, usum fructum mihi uendas: nam priore casu, etiamsi statim morieris, nihil mihi heres tuus debebit, heredi autem meo debebitur si tu uiuis; posteriore casu heredi meo nihil debebitur, heres tuus debebit.* In the first case the usufruct dies only with your life, in the second it dies only with mine. Cf. D. XXIV. 3. 1 57, and Vangerow *Pand.* § 344 Anm. 3.

(c) That there could be no transfer of a usufruct from a usufructuary *A* to *B*, so that *B* becomes usufructuary in place of *A* is clear from Gai. II. 30 *Usus fructus in iure cessionem tantum recipit: nam dominus proprietatis alii usum fructum in iure cedere potest, ut ille usum fructum habeat et ipse nudam proprietatem retineat: ipse usufructuarius in iure cedendo domino proprietatis usum fructum efficit, ut a se discedat et conuertatur in proprietatem; alii uero in iure cedendo nihilo minus ius suum retinet; creditur enim ea cessione nihil agi.* This is confirmed by Just. II. 4. § 3; D. X. 2. 1 15; XXIII. 3. 1 66 (Pompon.) where however the words *si usus fructus extraneo cedatur, id est ei qui proprietatem non habeat, nihil ad eum transire sed ad dominum proprietatis reuersurum usum fructum* have been taken to mean that such a surrender is not merely null, but has the effect of extinguishing *A*'s usufruct. The different modes which have been suggested to reconcile this with Gaius' words *ius suum retinet*, &c. are discussed in Vangerow *Pand.* § 344 Anm. 3, who himself thinks Pomponius' words represent one view of jurists, which has been unintentionally left by Tribonian. I agree with Huschke *Studien* p. 241, Böcking *Pand.* § 164 n. 19 and others, who, calling attention to the future *reuersurum*, take the words to mean that this act of surrender to a stranger will not in any way prevent the eventual return of the usufruct to the owner, when the surrendering usufructuary dies or loses his *caput*, &c.

(d) The inability to transfer a usufruct arising from the nature of the right is well seen in the case put in D. XLVI. 2. 1 4. There *A* is under an obligation to grant *B* a usufruct in some property: *B* wishes to extinguish a debt of his own to *C* by transferring *A*'s debt, just as he might desire to transfer to *C* a debt of money. This cannot be strictly accomplished: but *B* gets *A* to constitute a usufruct in favour of *C*. This is done by a stipulation made by *C* and a promise by *A*, just as if novation were intended (Gai. III. 176). But novation, though in one sense it created a new debt, required that the old debt should be modified into this new debt, not that a totally different thing should be substituted. Hence it often amounted to a mere transference of the debt from one person to another, e.g. *quem usum fructum debes Titio, eum mihi dare spondesne?* But *C* cannot stipulate for, and *B* cannot promise to create for *C*, the usufruct which *A* was bound to create for *B*: that usufruct is essentially connected with *B*'s person: and *A* can only create a similar usufruct, viz. that *C* should use and enjoy for *C*'s life. Ulpian however points out that as by this arrangement *A*



gives up the use and enjoyment for a period which may exceed that previously agreed on (for *C* may live longer than *B*), *A* is entitled to be protected (either by a plea of fraud or a special plea on the case) against any claim on the part of *B*, even if *B* outlive *C*.

**uel locare uel uendere]** 'either lease or sell'. In letting or leasing we retain the property or right, and part only for a time with the use or enjoyment, receiving in return a fixed hire in money (*merces*). In selling we part absolutely with the property or right and receive in return a fixed price in money (*pretium*). The purchase-money is usually a sum paid once for all or else in agreed instalments: hire or rent is usually paid at regularly recurring intervals throughout the period of the contract. But the mode of payment is not apparently of the essence of the contracts. In the case of a usufruct sale and lease would differ mainly by the contracts being for the whole duration of the usufruct or for a limited time (e.g. five years), and in any case would cease on the death or *capitis deminutio* of the usufructuary (D. XIX. 2. 19. § 1). A bare use (*usus*) could not be leased or sold (D. VII. 8. 18; 111; x. 3. 1 10. § 1); but the lease or sale of a usufruct is frequently mentioned, e.g. below ll 38—40; 1 67; x. 3. 1 7. § 10; XVIII. 6. 1 8. § 2; XXIV. 3. 1 57; Vat. Fr. 41. A lease or sale for a nominal consideration (*nummo uno*) was adopted as a convenient means of restoring to a woman after divorce the benefit of a usufruct, which the owner of the thing had given to the husband as dowry (D. XXXII. 3. 1 66). A similar sale *nummo uno* was at one time the form by which the burden and benefit were transferred from an heir to a *cestui que* trust (Gai. II. 252). Whether the same was applied to the transfer by a legatee of a usufruct left by way of trust is not said. In the case of trust-usufructs however the Praetor eventually treated the legatee as a mere channel, and the usufruct was attached to and endured with the person of the *cestui que* trust just as if originally constituted in him. (D. VII. 4. 1 4; 9. 1 9. pr.) [On sales *nummo uno* see Leist *Mancipation* ch. VII., Bechmann *Kauf* §§ 23, 24. Instances occur in Bruns *Fontes* Pt. II. 1; 2 b; e.] But in cases of regular inheritance it was not possible for a person once an heir to part with his legal position and put another into his shoes. An inheritance once accepted was no more alienable than a usufruct. But in both cases the practical object might be accomplished. The sale of an inheritance is the subject of a special title of the Digest (D. XVIII. 4). The purchaser of either inheritance or usufruct would bear the burden and take the profits of the position. Only he would be answerable to the heir or to the usufructuary for any neglect of duty, and any legal measures against third parties for the protection of his rights would be taken by or in the name of the heir or usufructuary, not in his own name.

**qui locat utitur, &c.]** He uses, i.e. exercises his right as usufructuary, by receiving the rent or hire or price. (See 1 35. § 1; 1 39; and cf. D. XXIX. 4. 1 5 *Si quis uendiderit hereditatem, utique possidere uidetur*.) *Utitur* is not here opposed to *fruitur*, though even such a use on the part of a usufructu-

any conscious of his full rights is sufficient to preserve his rights (D. VII. 4. 1 20); but it means 'exercise his rights', as in D. VII. 4. 1 25 *Placet uel certae partis uel pro indiuiso usum fructum non utendo amitti*; ib. 1 28; and below 1 38 *Non utitur usufructuarius, si nec ipse utatur nec nomine eius alius, puta qui emit, &c.*: and comp. *usucapio* 'taking by use, or by exercise of right'. If the proprietor hired or purchased the usufruct and sold it to some one else, the usufruct so hired or purchased was lost. Indeed in the case of purchase it would be merged. In the case of hire the proprietor would of course be liable to the fructuary by an action on the <sup>hire</sup> sale (D. VII. 4. 1 29. pr. § 1).

**precario concedat**] 'allow the enjoyment of the usufruct at (the usufructuary's) will'. This stands in a relation to gift (*donare*) somewhat analogous to that in which lease does to sale. It is a temporary surrender of the enjoyment, as gift is a permanent surrender, and both alike are unbought. *Precarium est quod precibus petenti utendum conceditur tandiu, quamdiu is qui concessit patitur... Et distat a donatione eo quod qui donat sic dat ne recipiat; at qui precario concedit sic dat, quasi tum recepturus cum sibi liberit precarium soluere* (D. XLIII. 26. 1 1. pr.; § 3). Such a tenancy, or holding at will, might exist in moveables and immoveables, corporeal and incorporeal things, e.g. in a servitude (ib. 1 2. § 3—1 4. pr.). The tenant was answerable for fraud (*dolus*) and gross negligence only (ib. 1 8. § 3—§ 6), and restitution was enforceable by an interdict (1 2; 1 14) and also by the *actio praescriptis uerbis* (1 2. § 2; 1 19. § 2). The tenancy was regarded as strictly personal, and therefore did not pass to the tenant's heir (1 12. § 1). It carried with it the possession, and the tenant had a right to the interdict *uti possidetis* against every one, except him who allowed the tenancy (1 2. § 1; 1 17). Mere casual occupation (e.g. as a guest) did not amount to such a tenancy nor give possession (1 6. § 2; 1 15. § 1). A person who having given a pledge asked to retain the use of it was decided to be a precarious tenant of his own property so pledged and restored (1 6. § 4). There is an interesting discussion of *precarium* by Savigny *Recht des Besitzes* § 42. He suggests that originally *commodatum* was confined to moveables (D. XIII. 1. § 1) and *precarium* to immoveables, and that the jural recognition of *precarium* had its origin in the relation between the nobles and their clients. Cf. Mommsen *Gesch.* B. I. cap. 13; II. 2. On the law of *precarium* generally see Vangerow *Pand.* § 691.

**donet**] Julian defines gift as follows: *Dat aliquis ea mente ut statim uelit accipientis fieri nec ullo casu ad se reuerti, et propter nullam aliam causam facit, quam ut liberalitatem et munificentiam exerceat: haec proprie 'donatio' appellatur* (D. XXXIX. 5. 1 1. pr.).

**puto eum uti**] Evidently the point whether by giving away (the enjoyment of) a usufruct a man ceased to use it and thereby in course of time lost it, was not beyond question. The principles on which the extinction of a usufruct by non-use rests are, I suppose, the presumption that non-use means abandonment of the right, and the desire on the part of the

legislator that property should be in active use and enjoyment, if not by one man, then by another. In the case of a gift by *A* to *B* of (the exercise of) a usufruct belonging to *A* there will be a user, namely *B*, and *A*'s gift is so far from being any evidence of abandonment that to treat it as abandonment would imply that a man gives only what he does not care to keep.

**retinere**] 'retains' i.e. does not lose his usufruct. Similarly D. III. 3. 1 72 *Per procuratorem non semper adquirimus actiones sed retinemus: ueluti si reum conueniat intra legitimum tempus, &c.*

**sed**] The Flor. ms. has *seu*: Steph. has ἀλλ' ἐι καὶ. Evidently *sed* is a necessary correction.

**negotium meum gerens**] A person who took upon himself to act for another without being asked by him was said *negotium alienum gerere*. If his services were beneficial, he had a right of action against the other (whose business he was doing) for the expenses and liabilities incurred in the due conduct of such business; while the other had an action against him to compel him to account for any profits received and to make good any damage accruing from his unlicensed interference (D. III. 5. 1 2; XLIV. 7. 1 5. pr.). The cause of such an interference is usually the absence or ignorance of a man, and the risk of his interests being injured by neglect or delay (ib.). The agent was liable for fraud and fault, but not for the unsuccessful issue of his action, if the action itself was not contrary to the principal's intentions (D. III. 5. 1 9; 1 10; 1 11. § 1; 1 12. Cf. 13. § 9). Ratification by the principal did not change the character of the action into one of *mandati* (ib. 1 8).

In the proposed case the usufructuary retains the usufruct because it is represented by the rent, which is the same evidence of enjoyment, whether the letting was conducted by the usufructuary himself or by another acting on his behalf and accountable to him.

**locauero**] The Greek Steph. confirms this reading (1st pers. sing.). Mommsen suggests *locauerit*. But *locauerit* would refer to the person *negotium meum gerens* mentioned in the previous sentence, and thus would not be consistent with a fresh mention of the same person again (*absente et ignorante—quis*), or would lead to the awkwardness of having two such persons spoken of. I see no objection whatever to *locauero*. Ulpian takes first the case of letting, divided into two, myself letting, or another letting for me; then takes the case not of letting but of actual user by an unasked agent.

**nihilo minus ret. us. fr.**] I retain the right, because the unauthorised agent is accountable to me for the use and enjoyment; and this claim for value is substantial evidence of my still exercising my rights.

§ 3. **fugitiuus**] A runaway slave was one who left his master's house, or concealed himself, with the intention of withdrawing himself from his master's service altogether. A definition of a fugitive is given for the purposes of the aediles' edict in D. XXI. 1. 1 17. The retaking of fugitive



slaves was a matter of public concern (D. XI. 4). A *lex Fabia* of uncertain date, but confirmed or enlarged by one or more decrees of the Senate (temp. M. Antonin.), forbade the sale or harbouring of any slave in flight. Paul. *Sent.* I. 6 A; D. XLVIII. 15. l 2—15; Cod. VI. 1. l 4; IX. 20. l 2; l 6; cf. D. XLVII. 2. l 36.

**in quo us. fr. est]** So D. XLV. 3. l 32; XLI. 1. l 43; *in quo us. fructum habet* D. II. 14. l 55; XLV. 3. l 33; *cuius us. fr. est* D. XLI. 2. l 49.

**stipuletur aliquid ex re mea]** i. e. make a formal bargain for something, the bargain being founded on a use of what is my property; e. g. if he lend some of my money, stipulating for its repayment with interest. This mode of expression is common in the Digest; e. g. l 25. §§ 3, 5, 6; III. 3. l 68; VII. 8. l 14. pr.; XLI. 1. l 37. § 5; XLV. 3. l 1. § 5; l 20. pr.; l 22 *Servum fructuarium ex re domini inutiliter fructuario stipulari, domino ex re fructuarii utiliter stipulari*; &c. Stipulation was one mode of acquisition, and *acquirere ex re* is to acquire by the use, or on the ground, of a thing. Cf. Gai. II. 87 *Quod servi nostri mancipio accipiunt, vel ex traditione nanciscuntur, siue quid stipulantur vel ex aliquolibet causa adquirunt, id nobis acquiritur*. 91 *De his autem servis in quibus tantum usum fructum habemus, ita placuit, ut quidquid ex re nostra vel ex operis suis adquirunt, id nobis adquiratur*; ib. III. 163 sq. *Stipulari ex re* &c. seems to find its justification in the fact that when a stipulation was immediately added to a loan (or other contract, cf. Savigny *Syst.* v. 493) the two contracts were fused into one. Cf. D. XLV. 1. l 126. § 2 *Quotiens pecuniam mutuam dantes eandem stipulamur, non duae obligationes nascuntur sed una verborum*; XLVI. 2. l 6. § 1; l 7.

Our text is also in the Vat. Fr. 89, but the words *ex re mea* are not found there and doubtless have been added by Tribonian. The words *stipuletur aliquid* by themselves would certainly include too much, if taken unconditionally of any and all stipulations. The usufructuary could not acquire by the stipulations of a slave of which he had the usufruct, except *ex re usufructuarii* or *ex operis servi*, i. e. unless the usufructuary's property or the slave's services were the cause of the stipulation. And even this might be frustrated, if the slave expressed the intention of acquiring for the owner (not the usufructuary). See Gai. II. 87, &c. quoted above; and below l 25; D. XLV. 3. l 1. § 5; l 22 (quoted above); l 27; l 28. pr. Why however did not Tribonian add the whole of the usual words *ex re mea vel ex operis suis*? I suppose because *ex operis suis* would have required further distinctions. A runaway slave's services belonged to the usufructuary only so long as he was not *bona fide* possessed by some one else. *Qui bona fide alicui seruit, siue servus alienus est siue homo liber est, quidquid ex re eius cui seruit acquirit, ei acquirit cui bona fide seruit. Sed et si quid ex operis suis adquisierit, simili modo ei acquirit: nam et operae quodammodo ex re eius cui seruit habentur, quia iure operas ei exhibere debet, cui bona fide seruit* (D. XLI. 1. l 23. pr.). Possession *ui, clam, or precario* did not interrupt the usufructuary's right (ib. l 22). But

even this *bona fide* possession by another does not destroy my usufruct, if the slave from time to time stipulates for me and uses my property. See below in this and next section.

**per traditionem accipiat]** Vat. Fr. 89 has (*mancipium*, a mistake for *mancipio accipiat*). With this substitution of delivery for mancipation compare D. XLI. 1. 1 10. § 1 where we have *quod servi nostri ex traditione nanciscuntur* for *quod servi nostri mancipio accipiunt uel ex traditione nanciscuntur* (Gai. II. 87 quoted in last note). The form of mancipation having ceased to be used, and the distinction of *res Mancipi* and *res nec Mancipi* being abolished, common delivery became applicable to all things without distinction. Tribonian must often have made like changes, e. g. I 29. § 1; VII. 8. 1 14. pr.; I 20, &c. See also note on I 3. pr. *et sine testamento* (p. 38), and on I 4 *uel praesens* (p. 43).

It is presumed that the slave's acceptance of delivery is either made expressly on behalf of the fructuary or at least not expressly on behalf of the owner. *Fructuarius servus si dixerit se domino proprietatis per traditionem accipere, ex re fructuarii totum domino acquirit: nam et sic stipulando ex re fructuarii domino proprietatis adquiret* (D. XLI. 1. 1 37. § 5; see the whole law; cf. XLV. 3. 1 39, &c.). The way in which such an express acceptance was made in case of mancipation is given in Gai. III. 167.

**per hoc ipsum, quasi utar]** 'by this fact, as if thereby I were using', i. e. exercising my right.

**magisque admittit retinere]** 'and Pomponius inclines to admit that I retain the usufruct'. Vat. Fr. have *retineri*. For *magis adm.* cf. D. XIX. 2. 1 9. § 1 *Sed an ex locato teneatur conductor, Marcellus quaerit: et magis admittit teneri eum*; XXIX. 2. 1 6. § 4. Similarly *magis puto* X. 3. 1 14. § 1; *magis arbitratur* XXXVI. 1. 1 11. pr.; &c.

**praesentibus]** opposed to *fugitivus*. Actual use is not necessary to the retention, in circumstances which give no presumption of abandonment. See I 55.

**infante]** Varro according to Censorinus (*de die nat.* 14) made five ages, each, except the last, of fifteen years; (1) *puer*, (2) *adulescens*, (3) *iuvēnis*, (4) *senior*, (5) *senex*, the last including all who were upwards of sixty years old. According to Servius (ad Verg. *Aen.* v. 495) he made five ages, (1) *infantia*, (2) *pueritia*, (3) *adulescentia*, (4) *iuventas*, (5) *senectā*. Solon, partly following Hippocrates, made ten ages, each of seven years (Censor. 14. § 4). Quintilian speaks of some persons being opposed to giving children any literary instruction under the age of seven, but himself recommends them to be taught as soon as they can speak (*ex quo loqui poterunt*), and takes this latter period as the age of three, and *infantia* as the first seven years (I. 1. §§ 15—21). Macrobius speaks of the seventh year as that *quo plane absolvitur integritas loquendi* (*Som. Scip.* I. 6. § 70). According to the lawyers an *infans* was one *qui fari non potest* (D. XXXVI. 1. 1 67 (65) § 3; XL. 5. 1 30. § 1) and this is identified with age under seven by D. XXVI. 7. 1 1. § 2. See also XXIII. 1. 1 14; Cod. Theod. VIII. 18. 1 8; *Inst.* VI. 30.

l 18. pr. With the Romans speech was the necessary (or presumed) instrument of the most important legal acts, and thus *fari posse* meant to be capable of legal acts. Hence we may take *fari posse* as not simply being able to speak, but being able to speak with knowledge of the words, though it may be not with knowledge of the full import of the business. Hence all under the age of puberty (14 in boys, 12 in girls) had guardians *Infanti placebat ex stipulatu actionem non esse, quoniam qui fari non poterat, stipulari non poterat* (D. XLV. 1. 1 70). *Pupillus omne negotium recte gerit, ut tamen, sicubi tutoris auctoritas necessaria sit, adhibeatur (tutor), veluti si ipse obligetur; nam alium sibi obligare etiam sine tutoris auctoritate potest ... Sed quod diximus de pupillo, utique de eo uerum est, qui iam aliquem intellectum habet: nam infans et qui infanti proximus est non multum a furioso differt; quia huius aetatis pupilli nullum intellectum habent: sed in his pupillis propter utilitatem benignior iuris interpretatio facta est; i. e. for convenience they are allowed to act auctore tutore.* (Gai. i. 107, 109.) See Savigny *Syst.* § 107 (Vol. III. 25 sq.); Schrader ad Just. *Inst.* III. 19. § 10. In the present passage, as a slave is spoken of, *infans* is probably to be taken in a general, not a technical, sense; cf. l 55.

**cuius operae nullae sunt]** ‘an infant’s services are nothing’. *Operae* meant ‘the services of a slave’ or ‘freedman’, in fact ‘a servant’s work’ and was used often in a quasi-technical meaning, so that *singulae operae* were ‘one day’s work’; Varr. *R. R.* i. 18. § 2 *Saserna scribit satis esse ad iugera VIII hominem unum: ea debere eum confodere diebus XLV, tametsi quaternis operis singula iugera possit. Sed relinquere se operas XIII ualetudini, tempestati, inertiae, indulgentiae*; Colum. II. 12. § 1 *Tritici modii quatuor uel quinque bubulcorum operas occupant quatuor, occatoris unam, sarritoris duas primum, et unam cum iterum sarriuntur, runcatoris unam, messoris unam et dimidiam, in totum summam operarum decem et dimidiam, &c.* i. e. ‘Four or five bushels of wheat require four days’ work of ploughmen, a harrower for one day, a hoeer for two at first and one more when hoed again, a weeder for one day, a reaper for one and a half; *Lex Urson.* 98 (p. 119, Bruns<sup>4</sup>) *eam munitionem fieri licet, dum ne amplius in annos singulos inque homines singulos puberes operas quinas, et in iumenta plaustraria, iuga singula, operas ternas decernant.* ‘The Council of the Colony may require for public works not more than five days’ work in the year from each grown man and three days’ work from each pair of cart-beasts’; D. XL. 7. l 20. § 5 *Quaedam condiciones nec possunt eodem tempore impleri...uelut cum decem operarum (operas?) iussus est dare, quia operae per singulos dies dantur*; XXXVIII. 1. l 1 *operae sunt diurnum officium*; XIX. 2. l 51. § 1 *Locauis opus faciendum ita ut pro opere redemptori certam mercedem in dies singulos darem; tametsi conuenit, ut in singulas operas certa pecunia daretur, praestari tamen a conductore debet, si id opus uitiosum factum est*; XLV. 1. l 54. § 1; below l 37. (*Operae* is also used for ‘workmen’, e.g. Col. XI. 2. § 82; Cic. *Sest.* 17; D. XLV. 1. l 137. § 3; &c.)



The services of an infant could not amount to anything ; those of one older, though still *impubes*, might be something (below l 55 ; D. VI. 1. l 31 ; XXXVIII. 1. l 7. § 5).

**defectae senectutis homine]** ‘a man of worn out old age’. Such constructions as *primam quamque arborem senio defectam tollere* (Col. v. 6. § 37) ; *ignoscitur etiam his qui aetate defecti sunt* (D. XXIX. 5. l 3. § 7) are more common. So *defectum fundum fertilem praestitit* (Cod. XI. 59. l 7). *Defectus* is also used of a legatee, &c. disappointed by the failure of a condition *defectus conditione* (Gai. II. 144 ; D. XXXV. 1. l 31), of the legacy or share lost or abandoned by the like failure (ib.) ; of bad debts *defecta nomina* (D. XXII. 1. l 11. § 1).

**retinemus us. fr.]** We retain the usufruct because we exercise all the rights which the object admits of. It is not the fruits in an economical sense that we have to take : if the land is barren, there are none to take : we have only to do no act and refrain from no act, which act or which refraining can reasonably be regarded as an abandonment of our right.

**fugitiuus]** Vat. Fr. § 89 here adds *intra annum mancipioe (mancipioque MS.) accipiat*. See note on l 5 *leg. temp. amitti* (p. 44).

**qua ratione retinetur, &c.]** The usufruct in a runaway slave is retained on the like principle to that on which the possession of the same is retained by the owner. This principle is, that as possession is retained by the will to hold as owner, though the immediate physical control does not exist (i.e. *animo*, though not *corpore*), an opposing act of will by another is required to divest our possession (D. XLI. 2. l 3. § 7 sqq. ; l 25. § 2). But a slave is not capable of such a will. *Fugitiuus idcirco a nobis possideri uidetur, ne ipse nos priuet possessione* (ib. l 13. pr.). *Haec ratio est quare videamur fugitiuum possidere, quod is, quemadmodum aliarum rerum possessionem interuenter non potest, ita ne suam quidem potest* (ib. l 15), where *suam* = *possessionem sui*.

The possession of a thing is not compared to possession of a usufruct but to the usufruct itself, which was really an effective natural possession and quite compatible with a legal possession by the owner. *Permisceri causas possessionis et ususfructus non oportet, quemadmodum nec possessio et proprietas misceri debent : nam neque impediri possessionem si alius fruatur, neque alterius fructum amputari si alter possideat* (D. XLI. 2. l 52. pr.).

§ 4. Julian (as quoted by Ulpian) proceeds to discuss whether the analogy between possession and usufruct holds as regards their extinction. If adverse possession of the slave is gained, the owner loses possession, the intention by which he holds being deformed by the intention of another who has gained also the corporal possession. Does the usufructuary similarly lose his right by another’s having got the legal possession? No : his exercise of the usufruct is always accompanied by another’s having the legal possession, and who that other is, matters nothing to him so long as he can exercise his usufruct. Consequently he holds on, though the slave

do nothing on his behalf which would keep the right alive, until the statutable period has arrived (see note on l 5 *leg. tempore amitti*, p. 44) : and he does not lose it at all, if within that period the slave bargains for him so that the slave's act can count as an exercise of his usufruct.

**intra constitutum tempus**] doubtless an alteration of Tribonian for *intra annum*. See above and note on l 5 *leg. temp. amitti* (p. 44).

**adquiri**] *adquiri potest* MSS. Mommsen after others suggests the omission of *potest* ; the retention of which could only be defended by supposing that Ulpian corrects Julian : but as Ulpian continues Julian's argument in the next sentence, and this argument evidently implies Julian's agreement to this sentence, *potest* cannot stand. One of the inferior MSS. has *colligit* (for *colligi*), which harmonizes better with *potest*.

**colligi posse dici**] 'it may be said it is proved'. For *colligi* cf. D. I. 3. l 19 ; XXII. 5. l 18 ; XXXVIII. 1. l 25.

**ne quidem**] see below on l 15 fin. (p. 126).

**paruique referre**] 'it is of small consequence', 'it matters little'. A usufruct was not affected by a change in the ownership of the property (D. VII. 4. l 19), nor by possession being gained by another (see above on § 3). What particular person may gain possession of a runaway slave is immaterial to the usufructuary, whether such person have or have not a legal claim to the property in the slave.

**ab herede...uel...uel...an**] The real contrast is between the legal and the illegal occupant. The heir, a purchaser of the inheritance, a legatee of the property, have all a *prima facie* right, and for this purpose any of them may be taken as examples; and they all form but one alternative: a *praedo* forms the other.

**ab herede possideatur**] Evidently the usufruct in question is supposed to have been left by will, the heir retaining the bare ownership.

**cui hereditas uendita sit**] The sale of an inheritance is the subject of a title in the Digest (xviii. 4) and of one in the Code (iv. 39). One who had accepted the position of heir could not afterwards divest himself of it, but remained the representative of the deceased both in his rights and obligations. But he could agree with another to relieve him practically both of the benefits and burdens of the position. This was effected by a sale, either for a substantial or a nominal consideration (*nummo uno* cf. note on l 12. § 2 *loc. uel uend.* p. 83), of the whole of the goods, credits and liabilities of the deceased, accrued and accruing. The purchaser brought and defended actions in the affairs of the inheritance, but originally only in the name of the heir, afterwards by a constitution of Antoninus Pius he could bring such actions (*utiles*) in his own name (D. II. 14. l 16. pr.; Cod. iv. 39. l 5). The goods were transferred by delivery (D. XVIII. 4. l 14). The contract of sale was binding, like any other contract, only between the parties, and did not affect the rights of third parties, e.g. the creditors and legatees, who could still recover from the heir. The heir, would then by an action on the sale, or the stipulation

accompanying it (Gai. II. 252), get reimbursement from the purchaser, just as, if profit accrued to him, or would have accrued to him if he acted *bona fide*, he would account to the purchaser (D. XVIII. 4. 1 2. §§ 4—9). If the Crown (*fiscus*) sold an inheritance, the transfer was complete and the creditors could enforce their claims only against the purchaser (Cod. IV. 39. 1 1). All rights and liabilities which the heir, before heirship, had against or to the inheritance were enforceable against or by the purchaser (D. XVIII. 4. 1 2. §§ 18—20; VIII. 4. 1 9).

The surrender (*in iure cessio*) of an inheritance under the old law had very different effects (Gai. II. 34 sqq.; III. 85 sqq.).

**cui proprietas legata sit**] The case put is one in which both the propriety and the usufruct have been bequeathed away from the heir, but to different persons.

**praedone**] 'a robber'. This term is frequently used in the Digest of one who gets or retains possession of a thing without any ground of right. It means *mala fide possessor*. Cf. D. V. 3. 1 25. § 3 *Loquitur de praedonibus, id est, de his qui cum scirent ad se non pertinere hereditatem, inuaserunt bona, scilicet cum nullam causam haberent possidendi*: ib. 1 11. § 1—1 13. pr.; 1 22; 1 28; 1 31. pr.; IX. 4. 1 13 *Non solum aduersus bona fide possessorem, sed etiam aduersus eos qui mala fide possident, noxalis actio datur: nam et absurdum uidetur eos quidem qui bona fide possiderent excipere actionem, praedones uero securos esse*. A *praedo* is distinguished from *fur* and *raptor* (D. V. 3. 1 13. pr.), *fur* being used only of moveables (D. XLVII. 2. 1 25), *raptor* implying force (D. XLVII. 8. 1 2. § 10; § 23).

**sufficere enim, &c.**] It is sufficient for the retention of the usufruct that the usufructuary should have the intention (lit. 'mental condition of one who wills') to retain, and that the slave should do something (i.e. some act of a characteristic nature) in the name of the usufructuary.

§ 5. **decerpserit uel desecuerit**] 'plucked or cut down', the former being applicable to ordinary fruits (e.g. olives, grapes, apples, &c.), the latter to corn, grass, &c. Cf. D. IX. 2. 1 27. § 25 *Si oliuam immaturam decerpserit uel segetem desecuerit immaturam uel uineas crudas Aquilia tenebitur*; XLVII. 2. 1 25. § 2 *Eorum quae de fundo tolluntur, ut puta arborum uel lapidum uel harenae uel fructuum, quos quis furandi animo decerpserit, furti agi posse nulla dubitatio est*, where *quos...decerpserit* is fitted to *fructus* and applies by zeugma to *arbores*, &c. In ib. 1 26. § 2 *decerptus* is used in reference to *fructus stantes* (see below p. 92, note on *pendentes*).

**maturos**] 'ripe for gathering'. Even though unripe, if the fructuary gathers them, they become his property (infr. 1 48. § 1, where see note); and though ripe, if not gathered, they are not his (D. XXXIII. 1. 1 8). For gathering unripe fruit he may or may not be answerable to the proprietor: that would depend on the circumstances, and amongst them on the relation of ripeness to the profitable use of the object of the usufruct (D. XXXIII. 2. 1 42). But in the usual course of things fruits when ripe are a source of immediate interest to the fructuary, though if not gathered they



remain the property of the bare owner. A similar connexion of thought in the use of *maturos* is in 1 27. pr. Cf. D. XIX. 1. 1 13. § 10. Gathering and taking the fruit when unripe would subject the thief to an action on the *lex Aquilia* in addition to the other actions (D. IX. 2. 1 27. § 25).

**pendentes**] 'still hanging', i.e. not yet separated from the tree. Cato, *R. R.* 146, gives a form of contract for sale of *olea pendens*, and 147 of *uinum pendens*, i.e. an ungathered crop of olives, and of grapes. So D. XVIII. 1. 1 39 *qui fructum oliuae pendentis uendidisset*; XX. 1. 1 15. pr.; VI. 1. 1 44; XLVII. 2. 1 62. § 8 *fructus pendentes*. In XXIV. 3. 1 7. § 15; XLVII. 2. 1 26 we have *fructus stantes* used of a like class of things, the former term being properly applicable to grapes, olives, apples, &c., the latter to corn, grass, and the like. In 1 27 (of our title) both terms are used: *Si pendentes fructus iam maturos reliquisset testator, fructuarius eos feret, si die legati cedente adhuc pendentesprehendisset; nam et stantes fructus ad fructuarium pertinent.*

**cui conditione teneatur**] 'who has the right of bringing a *condictio* against him'. Theft was punishable by the criminal law (Gai. III. 189 sq.; D. XLVII. 2. 1 93), but was also the subject of civil proceedings in an *actio furti* which was of a penal character and subjected the defendant, if condemned, to infamy (Gai. IV. 8; 182). Further, the thief was liable in a personal action for restitution (*condictio ex furtiva causa*), and might be liable in a vindication, and in an action *ad exhibendum* (Gai. IV. 4; D. XIII. 1. 1 7. § 1).

(a) A *uindicatio* could be brought by an owner against the possessor for the time being, whether the thief himself or one who had got the stolen property innocently or guiltily (D. VI. 1. 1 9). If the thief had parted with the property before the action was brought, the action did not lie against him. Parting with it fraudulently, after action brought, left him liable as before (ib. 1 17). The aim of the action was to recover the thing with all that belonged to it, or accrued by reason of it (ib. 1 20). But if the thing was destroyed, e.g. if a slave or animal died, without the possessor's fault, the action was as a rule only good for the recovery of the fruits or other belongings (ib. 1 15. § 3; 1 16).

In the case mentioned in the text a usufructuary could not bring a vindication as owner; the fruits were not his before gathering: whether he could bring the *confessoria* against the thief, who thus interfered with his rights as usufructuary, is not said (cf. D. VII. 6. 1 5. § 1; § 7).

(b) An action *ad exhibendum* could be brought by any one who had reasonable ground for requiring the production of a thing (D. X. 4. 1 2; 1 3. § 9); and against any one who had the actual possession of the thing or had fraudulently parted with it (ib. 1 3. § 15; 1 9. pr.). In case of non-production the defendant was liable for the value of the plaintiff's interest, i.e. for what he loses by its non-production; and this might be more or less than the value of the thing (ib. 1 9. §§ 7, 8; 1 11. pr.). As against a

thief, this action would be useful, if the thief had parted with the stolen property before action brought (cf. D. XII. 1. 1 11. § 2 fin.).

(c) A *condictio* was brought to recover what had wrongfully become the property of another. A *vindicator* claimed what was his own property but was wrongfully detained from him by another: he must assert *rem suam esse*. A *condictor* admitted that the property was in another: but claimed that the defendant *rem dare oportere*. As theft did not change the property in the thing stolen, it was really an abuse of the *condictio* to allow it to be brought against a thief, and Gaius admits this, and only excuses it *odio furum* (Gai. iv. 4). In truth the positive law against theft's changing the property could not alter the natural consequences of the act: if the thief mingled the stolen money or the goods with other of the same kind, identification became impossible; and if he consumed the stolen goods, that was no reason for defeating the owner's right to restitution (cf. Savigny *Syst. v. Beil.* XIII. 15). But if the owner parted with his property in the stolen goods, his right to bring a *condiction* lapsed (D. XIII. 1. 1 10. § 2). The aim of the action was the recovery of the stolen thing, or, failing that, its value, with its fruits and incidental advantages (*id quod interest agentis*, ib. 1 3). A *condiction* could be brought only by the owner who had been robbed, and only against the actual thief or his heir or heirs (in proportion to their shares, 1 9). The destruction of the thing stolen or death of a slave stolen did not defeat this action as it defeated vindication (ib. 1 7; D. XLVII. 2. 1 46. pr.; Gai. II. 79). Recovery of the thing, or damages obtained in one of these last two actions, was a bar to the other being brought (D. XLVII. 2. 1 9). A practical distinction between the three actions is given in D. XII. 1. 1 11 *Uindicari nummi possunt si extant; aut si dolo malo desinant possideri, ad exhibendum agi; quod si sine dolo malo consumpsisti, condicere tibi potero*.

Both in *vindicatio* and *condictio*, under the formulary system, the condemnation 'sounded in damages', i.e. it was expressed in the formula as money: but this condemnation was actually passed, only if restitution of the thing claimed and its accessories was refused or impossible (Gai. iv. 48; 114; cf. Just. iv. 17).

(d) An action for theft (*actio furti*) was not intended to restore to the owner the thing stolen or its equivalent, but to inflict a heavy penalty. A successful plaintiff recovered twice the greatest value of the stolen thing, or, if the thief was caught in the act, fourfold such value (Gai. III. 189, 190; D. XLVII. 2. 1 50. pr.). This action was wholly independent of vindication or *condiction*, and could be brought and the penalty recovered, even after recovery of the thing and its accessories had been obtained in either of those actions. Nor was success in this action any bar to either of those being brought subsequently (ib. 1 55. § 3; Cod. VI. 2. 1 12. § 1). This action lay against the thief, his advisers and accomplices (Gai. III. 202; D. XLVII. 2. 1 50. §§ 1—3). Theft was defined as a fraudulent handling for the sake of gain, either of a thing, or of the use or possession of a thing

(*Furtum est contrectatio rei fraudulosa lucri faciendi gratia uel ipsius rei uel etiam usus eius possessionisue* D. XLVII. 2. l 1. § 3). An action for theft might therefore be brought by various persons (e.g. a bare owner, a usufructuary, a mortgagee, a borrower of the thing stolen) for the same act of theft, and the success or compromise of the one did not affect the rights of the others. For any one was entitled to the action who was interested and had a right to the thing or to its possession or use, or with the consent of the owner was responsible for its safe keeping (ib. l 14. esp. § 16; l 46. § 5; l 60; l 86, &c.; Gai. III. 203 sqq.).<sup>1</sup> Where the usufruct was in one and the ownership in another, each had an action to the extent of his interest. *Diuidetur actio inter dominum et fructuarium: fructuarius aget de fructibus uel quanti interfuit eius furtum factum non esse eius..., proprietarius uero aget, quod interfuit eius proprietatem non esse subtractam* (D. XLVII. 2. l 46. § 1).

**non fiunt fructuarii]** See n. on l 9. pr. (p. 67).

**terra separentur]** Whether corn or grapes, they would, till cut, be connected with the ground. Hence gathering (*perceptio*) is different from, though it may include, separating them from the ground. Cf. D. XLI. 1. l 48. pr. *Fructus, etiam priusquam percipiat, statim ubi a solo separati sunt, bonae fidei emptoris sunt*; XXII. 1. l 25. § 1 (quoted above on l 9. pr. p. 67); VII. 4. l 13.

**magis proprietario, &c.]** *Magis* implies that Julian had some hesitation in the matter. Probably the doubt was, whether the condiction should not be held to be in suspense, until the eventual property in the fruits was ascertained.

**competere]** literally, 'to aim together' is used in the historians of being (mentally) 'collected', e.g. Sall. ap. Non. p. 276 *Sic uero quasi formidine attonitus neque animo neque auribus aut lingua competere*; and frequently in Columella of a thing suiting or being practicable, e.g. IX. 1. § 1 *utcumque competit proximus aedificio loci situs*, 'whenever suitable'; II. 18. § 2 *Si non competit, ut in uillam foenum portetur*, &c. In the law writers it is common in the sense of legal fitness or competence, e.g. *apud competentem iudicem* (D. II. 1. l 19. pr.) 'before a judge with competent jurisdiction'; *competenti remedio* (D. I. 18. l 7) 'with a proper remedy'; so of an action frequently, as here; cf. D. L. 16. l 54 '*Conditionales creditores*' dicuntur et hi quibus nondum competit actio, est autem competitura, uel qui spem habent ut competat; of a right, cf. D. XXXVII. 1. l 3. § 9 *Si plures sint quibus bonorum possessio competit* and again *hae portiones quae ceteris competenter*. It is also used absolutely, below l 66; Gai. IV. 112; &c.

**furti actionem]** See note above p. 93.

**quoniam interfuit, &c.]** The use of the indicative ought to imply that Ulpian was speaking his own view, and not merely quoting Julian's, but such an implication in the Digest is doubtful. As to the fact, see D. XLVII. 2. l 10 *Cuius interfuit non subripi, is actionem furti habet*.

**mouetur eo]** 'is moved by this circumstance', i.e. 'finds a ground for doubt', 'sees occasion for consideration in this'. Cf. D. III. 5. l 7. § 3



*Mouetur eo, quod, si data fuerit aduersus eum actio, necesse erit et eum per-tingi qui uetuit*; Collat. XII. 7. § 10; D. IV. 3. 1 7. § 8 *ego moueor*; XIII. 1. 117 *Nec me mouet, praesens homo fuerit necne*; XXXIII. 2. 1 26; XLVII. 2. 1 55. § 1; 1 75.

**fortassis fiant eius**] Evidently it was not a clear point to Marcellus that under the circumstances the fructuary had any right to the fruits. He had not plucked them; they remained the property of the proprietor, although stolen by the thief: it was questionable whether now the fructuary had or could make any claim to them at all. Hence he says *fortassis*. 'It may be, notwithstanding this apparent lapse on the part of the fructuary, that if he yet gets hold of them they become his'.

**si fiunt**] as to mood, see note above on *quoniam interfuit*.

**qua ratione**] 'on what principle', 'by what mode of argument?' Cf. D. XLVII. 2. 1 62. § 8 *Qua enim ratione coloni fieri possint?* See above 1 7. § 1 *hac ratione*.

**efficientur**] The Flor. ms. has *efficientur*: the inferior mss. *efficiuntur*. In matters of this kind the language of the lawyers is loose: but certainly no other mood than that of *efficientur*, which Haloander conjectured, is tolerable in Latin. *Efficerentur* is a possible reading. But the use of the present subj. following the imperfect subj. is found sometimes in classical writers; e.g. Caes. B. G. v. 58 *praecipit...unum omnes peterent Indutiomarum, neu quis quem prius uulneret quam illum interfectum uiderit*. In our passage the change may be intentional, the point of time being taken when the produce has already become the property of the proprietor, and the chance of its being seized by the usufructuary is yet in the future.

**exemplo rei, &c.**] 'according to the analogy of a thing bequeathed conditionally'. Pending the condition, the property is in the heir. Cf. D. XXXI. 1 32. § 1 *Fundum ante condicionem completam ab herede non traditum sed a legatario detentum heres vindicare cum fructibus potest*; x. 2. 1 12. § 2. If the thing bequeathed is in the possession of the heir, the legatee can require security, or in default was put by the Praetor into possession, subject to account, D. XXXVI. 3. 1 1. § 2; 4. 1 5. § 22.

**uerum est enim**] Here Ulpian confirms the somewhat hesitating opinion of Julian. See above note on *magis proprietario* (p. 94).

**cum autem in pendenti est dominium**] 'but whenever the ownership is in suspense'. In the case just treated of, Ulpian, agreeing with Julian, held that the ownership was not in suspense, but was for a time in the proprietor until the fructuary seized the fruits, on which occurrence the property passed to the fructuary; if the fructuary never seized the fruits, the property would remain with the proprietor. This is a case of what is often called by modern writers *dominium reuocabile*: there is a true owner for a time who can bring a suit as such; but since on the property being divested some intermediate acts would be invalidated, such a revocable ownership is easily confused with suspended ownership, in which there is for a time no owner at all. See Vangerow *Pand.* §§ 95, 96, 301;

Wächter *Pand.* § 69 and *Beilage* IV.; and my notes below on l 25, and l 70. The Greeks do not recognise the distinction clearly made in this passage. They probably took *cum est* as 'since it is'; a use sometimes found.

**in pendenti]** A common phrase; cf. l 25. § 1; XXIII. 3. l 80; XXVI. 1. l 6. § 4; XXXVIII. 17. l 10. § 1; XLV. 1. l 106, &c.; *in suspenso esse* D. XXX. l 86. § 2; IX. 4. l 15; &c.

**in fetu qui summittitur]** 'in the young which is allowed to grow up'. See l 68—70 where the matter is fully treated.

**in eo quod seruus, &c.]** See below l 25. § 1, and note thereon.

**ab eo satisfacto]** 'enough having been done by him to content the seller'. *Satisfacere* is a word of much more general and less technical meaning than *satisdare* (on which see note on *caveri* p. 57). It comprehends any fulfilment of a condition, duty, judgment, &c. Cf. D. II. 4. l 1 *Satisfactio eodem modo appellata est quo satisfactio. Nam ut satisfacere dicimur ei cuius desiderium implemus, ita satisdare dicimur aduersario nostro, qui pro eo quod a nobis petit ita cauit* ('has taken precautions'), *ut eum hoc nomine securum faciamus datis fideiussoribus*; XLV. 1. l 5. § 3; so *satisfactum est eiusmodi condicioni* (D. XXXVI. 1. l 79. § 1); *arbitri sententiae fuerit satisfactum* (XXXV. 1. l 50); *ante rem iudicatam satisfacere actori* (Gai. IV. 114). It is frequently contrasted with *soluere*, and may include giving real security (*pignus*), or personal security (*fideiussores*), or another's undertaking the debt (*expromissio*): e.g. D. XLVI. 3. l 52 *satisfactio pro solutione est*; XL. 7. l 39. § 1 *Stichus liber esto, quando aes alienum meum solutum creditoribusue meis satisfactum erit*; XIII. 7. l 9. § 3 *Omnis pecunia exsoluta esse debet, aut eo nomine satisfactum esse, ut nascatur pigneraticia actio* ('suit for recovery of a pledge'): *satisfactum autem accipimus quemadmodum uoluit creditor, licet non sit solutum, siue aliis pignoribus sibi caveri uoluit, ut ab hoc recedat, siue fideiussoribus, siue reo* [i.e. *expromissore*] *dato, siue pretio aliquo uel nuda conuentione*; XIV. 4. l 5. § 18; XVIII. 1. l 53; and below l 25. § 1.

**pendere]** The MSS. have *dicendum est conditionem pendere, magisque in pendenti esse dominium*; which, Mommsen thinks, is confirmed by Bas. *ἡρτηται οὖν καὶ ἡ τοῦ πράγματος ἀπαίτησις καὶ ἡ δεσπότεια*: but as this is in the Basilica placed before the examples *in fetu*, &c., it seems more probable that the words are merely a summary. The Greek Commentators are here not decisive. Mommsen concludes that the MS. reading is either redundant or stands for something like *magisque sequi quod in pendenti est dominium*. I have omitted the latter part as certainly redundant, and probably due to the copyists, one of whom perhaps noticing that Julian's words in the case of a slave's receiving goods for which he does not pay cash were *in pendenti esse dominium* (see l 25. § 1), has written these in the margin and prefixed *magis* to imply that Julian's words were not precisely given in our text.

**l 13. pr. potest in ea re—hoc fiat]** literally 'can demand sureties to be given in respect of that thing, so that the same may be done by the judge's

authority'. The sentence is awkward. One would have expected rather *dominus potest in ea re desiderare ut officio iudicis satis detur*. As it is, we must take *ut... fiat* as an afterthought by way of explanation.

**satisfactio**] See note on l 7. § 1 *caueri* (p. 57).

**officium iudicis**] A common phrase implying that it is to be done by the judge as a matter within his competence and as part of his duty as judge in the case, whether it be the express object of the suit or not, and whether it be enjoined by the testator or not. In fact it is much the same as 'without special application or plea or authorization'. Cf. D. v. 3. l 38 *Sed benignius est in praedonis quoque persona haberi rationem impensarum (non enim debet petitor ex aliena iactura lucrum facere), et id ipsum officio iudicis continebitur, nam nec exceptio doli mali desideratur*; III. 5. l 5. § 14; l 6 *Si forte non fuerit usurarium debitum, incipit esse usurarium.....quia tantundem in bonae fidei iudiciis officium iudicis ualet, quantum in stipulatione nominatim eius rei facta interrogatio*; D. VI. l 19; l 76; x. 2. l 18. § 2; 3. l 6. § 10; XIX. 2. l 19. § 3; l 25. § 5; XXI. l 143. § 6; XXIII. 5. l 7. § 1; XLIV. 4. l 4. § 3; &c. See also Just. IV. 17.

**nam sicuti debet, &c.**] 'for as the fructuary has a right to the use and produce, so the proprietor has a right to be secured in the proprietorship'. And this is so however the usufruct may have been constituted. The judge's duty then is (1) to require a usufructuary to give security, before he is allowed to enforce his right to the usufruct; (2) when a complaint is made respecting the usufructuary's mode of dealing with the thing, not only to settle any disputes about the past, but also to prescribe a course for the future; (3) if there are two usufructuaries, either to divide the usufruct between them, or to compel them to give each other bonds to respect each other's rights.

Then in the fourth section Ulpian proceeds, after giving a general rule for the conduct of the usufructuary, to apply it to the cases of bequest of the usufruct of a country estate (§ 4), of a building (§ 7), of a family residence (§ 8), of slaves (l 15. § 1), of moveables (§ 3), and particularly of garments (§ 4), and theatrical properties (§ 5). He then gives a corresponding rule for the conduct of the proprietary (§ 6), and deals specially with the questions of the imposition of servitudes (§ 7); of the dedication of land to religious purposes (l 17. pr.); of slaves (§ 1).

**ad omnem us. f.**] 'any and all usufructs', i.e. however created. For this use of *omnis* cf. l 3. pr. *omnium praediorum iure legati potest constitui ususfructus*; Hor. Ep. I. 5. 2 *nec modica cenare times holus omne patella*. For the law cf. 9. l 1; Cod. III. 33. l 4 (anno 226) *Usufructu constituto consequens est, ut satisfactio boni uiri arbitrio praebeatur ab eo apud quem id commodum peruenit, quod nullum laesionem ex usu proprietati adferat. Nec interest siue ex testamento siue ex uoluntario contractu ususfructus constitutus est*.

**probat**] not 'proves', but 'approves', i.e. Julian agrees that these prin-



ciples apply, &c. Similarly with an acc. and infin. D. XLIII. 24. 1 15. § 11; 27. 1 1. § 5 *Praeterea probandum est, si arbor communibus aedibus impendeat, singulos dominos habere hoc interdictum*; XIX. 2. 1 50.

**si usus fructus legatus sit**] These words are superfluous and awkward; we ought to have only what is common to all usufructs. Probably they were in the text on which Julian was commenting.

**dandam actionem**] i.e. the Praetor should not grant the usufructuary the right to sue the heir to put him in enjoyment of the usufruct, until he has given sureties, &c. This oblique sentence is dependent on *probat*, but as Ulpian agrees with Julian, he soon passes into direct language (*oportet*).

**se boni uiri arb. &c.**] See the 9th title of this book esp. 1 1, and my note above on 1 7. § 2 *per arbitrum cogi* (p. 58). For *boni uiri arb.* see note on 1 9. pr. (p. 67).

This same stipulation could be obtained afterwards, if the heir had made delivery without it. The proprietor could either bring a vindication for the property, and if the usufructuary pleaded that it had been delivered to him on the ground of usufruct, make a replication, or could directly claim this stipulation by a *condictio* (9. 1 7. pr.).

**plures a quibus, &c.**] ‘even if there should be more than one person on whom the usufruct is charged’, i.e. if the testator should have given the estate or thing to several persons as heirs, and have given the usufruct in it to another or others.

For a *quibus.....relictus est* see note on 1 7. § 2 *ab ea re relicta* (p. 65).

**singulis satisdari oportet**] ‘each of these proprietors is entitled to receive security from the usufructuary’, i.e. in proportion to their respective shares. D. VII. 9. 1 9. § 4 *Si plures domini sint proprietatis, unusquisque pro sua parte stipulabitur*. If the usufructuary gave ground of complaint, each proprietor would obtain damages only in proportion to his own share in the proprietorship. If the property were divided, the *arbiter familiae erciscundae* would deal with these stipulations according to the mode of division or adjudication arrived at (cf. D. X. 2. 1 22); and his arrangements would be supported by the Praetor (ib. 1 44. § 1).

§ 1. **cum igitur de u. f. agitur**] ‘whenever then a suit is brought about the usufruct’, i.e. by the proprietor to keep the usufructuary within proper limits of use. So Steph. *ἡνίκα δὲ ὁ προπριετᾶριος κατὰ τοῦ οὐσυν-φρουκροπαρίου τὴν ἐκ ταύτης τῆς ἱκανοδοσίας κινεῖ ἀγωγὴν*. The action would be brought on the stipulation.

**arbitratur**] sc. *iudex*. So apparently Steph. But it may be taken as passive with *quod factum est* as subject. Cf. Sen. Rhet. Contr. III. *Praef.* § 13 *Hoc ita semper arbitratum est, scilicet quasi ludum esse, forum arenam*; D. XI. 7. 1 12. § 5 *Sumptus funeris arbitrantur* (‘are fixed’) *pro facultatibus uel dignitate defuncti*; IV. 8. 1 27. § 4 *Si quis litigatorum defuerit, quia per eum factum est quominus arbitretur* (‘an award be made’), *poena*

*committetur*; and again in same section. See Neue, *Formenlehre*, II. p. 274.

**debet]** *sc. usufructuarius*. The judge has not only to assess damages for past infractions of duty, but to give directions for the due use and enjoyment for the future, and that will comprehend what the usufructuary must do or refrain from doing, and also what he may do, i.e. what the proprietor must permit.

§ 2. **lege Aquilia]** The *lex Aquilia*, of uncertain author and date, but conjecturally referred to A.U.C. 467 (Rudorff, *R. G.* I. § 41) superseded the provisions of the Twelve Tables and other statutes, and, being enlarged by the interpretation of the lawyers, was the principal source of actions for physical injury caused by any malice or fault of one person to the person or property of another. The cause of action was called *damnum iniuriā datum*, and the action was often called briefly *damni iniuria* (*sc. dati*), or abusively *damni iniuriæ*. The statute was directed against any one who slew (*occiderit*) a slave or four-footed animal (*pecudem*) belonging to another; or burnt, broke or tore (*usserit, fregerit, ruperit*) anything belonging to another. The damages were to be measured by the greatest value within the preceding year in the case of slaying, or within the last thirty days in the other case. The owner was the person entitled to sue. Denial by the defendant, if the case was proved, doubled the damages. (Gai. III. 210 sqq.; D. IX. 2, esp. l 1; l 21; l 27. § 5; l 23. § 10; l 29. § 8.)

Interpretation, partly by introducing analogous actions *in factum*, *cf. L. u. R. 1-11* extended the sphere of the remedy in many ways, so as to comprise not only slaying, but causing death (e.g. a poisoner, though he did not himself administer the poison, D. I. c. 19. pr.; one who frightened a horse which threw its rider, though he did not himself push the rider off, &c. l 9. § 3); not only burning, breaking, &c., but any kind of physical damage, l 27. §§ 13—17; not only damage done to a slave or animal belonging to one, but damage done to a child under one's power or to oneself (l 5. § 3; l 13. pr.). Not only the owner, but also a usufructuary or pledgee, could bring the action or an analogous one (*utilis actio* l 11. § 10; l 30. § 1); and the value of the thing damaged was taken to mean all that the owner would have obtained by means of it (e.g. to include an inheritance to which a slave was made heir). D. I. c. 122. § 1—l 23. § 6.

Of offences coming under this law and affecting our present title there are mentioned, cutting down timber before it was old enough (D. I. c. 127. § 26); setting fire to the farm-house (ib. § 8; § 11), or to a wood (Cod. III. 35. l 1), pulling down or firing a dwelling-house (Cod. ib. l 2), treating a slave improperly, so as to make him less valuable (D. I. c. 127. § 17; below l 15. § 2), or killing or maiming him, &c.

**tenetur]** 'is bound by', i.e. is liable under. Cf. Cic. *Caecin.* 14. § 41 *Hoc interdicto Aebutius non tenetur*; Gai. III. 144; IV. 4 *quo magis pluribus actionibus teneantur*. The plaintiff is put in the dative, e.g. Gai. III. 85 *ob id creditoribus ipse tenebitur*.

**interdicto]** There are many occasions on which an immediate interposition of authority is necessary to secure people in the present enjoyment of their rights, real or apparent, instead of leaving them to have their rights violated and then bring an action for damages. If the law does not interfere temporarily to protect possessors *de facto*, violence and serious complications may ensue before the rights of the parties can be legally determined. Hence the Praetor was in the habit of issuing on application injunctions to do, or to forbear doing, certain things. These injunctions were called generally *interdicta*: sometimes positive injunctions were called *decreta* (Gai. iv. 139; cf. 142; Just. iv. 15. § 1). After such an injunction was issued, if obedience was not given to it, a judge or *recuperatores* were empowered by a formula to inquire into the allegation of disobedience, and award possession or damages accordingly (Gai. iv. 140 sq.; 161 sq.). After the formulary process was abolished, the matters formerly for interdict were dealt with by *actiones utiles* (Just. iv. 15. § 8). The name however was retained in the Digest.

The principal classes of interdicts were (a) for securing the due possession of a deceased person's property by the person authorized temporarily or permanently by the Praetor (D. XLIII. 2. 3. 4); or the possession of a bankrupt or confiscated estate (Gai. iv. 145, 146); (b) for preventing interference with the due enjoyment of public places, roads, rivers, &c. (D. XLIII. 6—15); (c) for preventing interference with private possessors of land, moveables, easements, &c. (ib. 16—25; 31); (d) for recovering land held on sufferance; (e) for obtaining the production of testamentary documents or of freedmen or children (ib. 5; 29; 30); (f) for allowing for certain purposes entry on neighbour's land (ib. 27; 28). See also Cod. viii. 1—9.

**quod vi aut clam]** This interdict was so called from its initiatory words. As given by Ulpian (D. XLIII. 24. l 1. pr.) it ran thus: *Quod vi aut clam factum est, qua de re agitur, id, cum experiendi potestas est, restituas*. Some words are evidently omitted to which *cum exp.* refer. The insertion, after *id* and before *cum*, of the words *si non plus quam annus est* (cf. l 15. § 4) is generally adopted (see Mommsen *ad loc.*; Rudorff, *Edict.* p. 225; Lenel, *Ed. Perp.* p. 387). 'Anything that has been done by force or stealth in the matter in question, if it is not more than a year since there has been an opportunity of suing, you are to restore'. This injunction may be brought by any one who had a present interest in the matter (e.g. owner, fructuary, farm-tenant, tenant at will, licensee to fell timber), and against any one in possession of the land or not, who executed the work (l 11. § 12; l 12. § 4; l 15. pr.; l 16. § 2). The work or act must be one connected with land (l 1; l 7. § 5; l 20. § 4); e.g. (to take acts improper for a fructuary) one who erected a building, who pulled down a building, who cut down trees, who dug trenches in the ground, who fouled the water of a well, who removed a statue, who turned his rain-drop on to a tomb, was liable to this injunction (l 7. § 5; l 9; l 11). Any possessor was bound to permit the old state to be restored: the doer was bound, besides this,



to defray the expense, and was liable for any loss the injured party had incurred (l 16. § 2 ; l 15. § 7 ; &c.). The suit could not be defeated by a claim of right to do the particular act complained of : if a man had a right, his proper course was to give notice to the owner or other person interested, whose interference he might anticipate, of his intention to act, and in that case the injunction would not issue (l 1. §§ 3—7). *Vi facit*, whoever acts contrary to any prohibition, or forcibly prevents a prohibition (l 1. § 5 sq. ; l 20. §§ 1—3) ; *clam facit*, whoever acts without specific notice or after insufficient notice (l 3. § 7—l 5. § 4). Such act might be defended if done to demolish a work erected *vi aut clam*, or to prevent a fire spreading (l 7. §§ 3, 4), or if the doer offered security, while his right was challenged by a regular action (l 3. § 5).

The spheres of this interdict and of the Aquilian law were different, but intersected one another. The interdict is closely related and complementary to the *operis novi nuntiatio* (D. xxxix. 1. l 1. § 1), and is applicable concurrently with the Aquilian, only where that can be brought for injuries to land or connected with it. The original object of the Aquilian was damage to slaves and animals, and injuries to land come under it only because no special exclusion was made. Besides this difference in the sphere, fault however slight (D. ix. 2. l 44. pr.) was necessary and sufficient to ground the Aquilian action ; but for the interdict force and stealth in the technical senses, i.e. disregard of notice and absence of notice, had to be proved. Fault in the ordinary sense was not required. (D. xliii. 24. l 15. § 11 relates only to fault as affecting the possibility of restoration.) Where the interdict and the Aquilian action (or any other) concurred, if a man recovered full damages, the interdict could not be brought. Both proceedings could be brought by heirs, and, so far as heirs had profited by the work or act, also against heirs (D. ix. 2. l 23. § 8 ; xliii. 24. l 13. § 5 ; l 15. § 3).

**fructuarium quoque**] ‘a fructuary as well as others’.

**nec non furti**] sc. *actione*, ‘aye and (in an action) of theft’. *Necnon* is properly used only to introduce an unexpected affirmative. Sometimes *nec non et* D. ii. 14. l 9. pr. Here probably Ulpian has in his mind not merely plain acts of theft, such as removing and selling valuable marbles from a house, but a taking of what was not really fruits, or an unjustifiable use of the property. He says (D. xlvii. 2. l 46. § 6) *Proprietarius quoque agere aduersus fructuarium potest iudicio furti, si quid celandae proprietatis uel suppressendae causa fecit*. There was nothing in the position of a fructuary to exempt his acts from being treated as thefts. Even an owner was liable for theft, if he removed from his creditor a thing which he had pledged to him (ib. l 12. § 2 ; l 19. §§ 5, 6), or from a borrower a thing which he had lent him, and on which the borrower had claims on account of expenses (ib. l 15. § 2 ; l 60), or if he removed or improperly handled a thing of which another had the usufruct (l 15. § 1 ; l 20. § 1). So a borrower using a thing otherwise than he thought the

owner would allow (1 40 ; 1 77), or lending it to others (1 55. § 1), or a tailor or cleaner using or lending clothes sent him to mend or clean (1 48. § 4 ; 1 84. pr. &c.) are held liable for theft.

**consultus]** sc. *Iulianus*. Cicero often speaks of the practice of the lawyers to give advice to any who consulted them, and this being done in public formed a kind of practical instruction to law students who attended them regularly. *Orat.* 42. § 143 *Alteros respondentes audire sat erat, ut ei qui docerent.....eodem tempore et discentibus satisfacerent et consulentibus*; *Brut.* 89. § 106 *Ego autem iuris civilis studio multum operae dabam Q. Scaeuolae Q. F., qui, quamquam nemini se ad docendum dabat, tamen consulentibus respondendo studiosos audiendi docebat*. Official authority was given to these answers of certain jurists by Augustus: *D. i. 2. 1 35. § 49 Ante tempora Augusti publice respondendi ius non a principibus dabatur, sed qui fiduciam studiorum suorum habebant consulentibus respondebant: neque responsa utique signata dabant, sed plerumque iudicibus ipsi scribebant aut testabantur qui illos consulebant*<sup>1</sup>. *Primus diuus Augustus, ut maior iuris auctoritas haberetur, constituit ut ex auctoritate eius responderent: et ex illo tempore peti hoc pro beneficio coepit*. Cf. *Seneca Ep.* 94. § 27 *iurisconsultorum ualent responsa, etiamsi ratio non redditur*. Gaius says *1. 7 Responsa prudentium sunt sententiae et opiniones eorum, quibus permissum est iura condere. Quorum omnium si in unum sententiae concurrant, id quod ita sentiunt legis uicem optinet: si uero dissentiant, iudici licet quam uelit sententiam sequi: idque rescripto diui Hadriani significatur*. Whether such opinions were obtained by the parties and presented by them to the judge, or obtained by the judge himself; whether all were consulted as a body (which is not probable), or any one or more as the parties chose, we do not know. (Cf. *Zimmern, Rechts-Gesch.* I. § 54 p. 200 sq.; *Walter II.* § 431; *Clark, Pract. Jur.* pp. 293 sqq.) Two practical examples in the Digest (*III. 5. 1 33*; *XIX. 1. 1 43*) appear to be questions submitted by a judge to Paulus. In one an opinion of Ulpian is said to have been produced and read.

**quo bonum fuit, &c.]** 'what was the good of the Praetor's promising an action?' Cf. *D. xxxvii. 4. 1 3. § 11 Cum enim possit secundum tabulas habere possessionem, quo bonum est ei contra tabulas dari?* *ib.* 1 10. § 4; *XLVI. 3. 1 93. pr. Quo bonum est hoc dicere?* *Papinian ap. Collat.* iv. 8. § 1. For this use of *quo* cf. *Hor. Sat.* i. 1. 73 *Nescis quo ualeat nummus, quem praebeat usum?* *Ov. M.* XIII. 103 *Quo tamen haec Ithaco (sc. datis)?* (The like use of *quo* indef. is in *Caes. Gall.* vii. 55 *ne quo esset usui Romanis*, where even the latest editor, A. Holder, reads *quoi* against the mss. and against the rules of Latin. The Romans did not use such an attribute as *quoi* with a predicative dative. See my *Lat. Gr.* II. Praef. p. xxx.)

<sup>1</sup> i.e. 'In general the lawyers wrote their opinions to the judges, or those who consulted the lawyers made an affidavit of their having heard the opinion'. I do not doubt that *ipsi* is the *prudentes*, though differing in this matter from the excellent authority of Prof. Clark, *Pract. Jurispr.* pp. 283, 293. I cannot find *testor* used in the jurists of 'calling witnesses.' It is 'declare before witnesses'.

**actionem poll. praet.]** The Praetor promises an action usually by compelling the giving of a bond by the usufructuary as the condition of his being put into possession. Cf. D. XLVI. 5. l 1. pr. *Praetoriarum stipulationum tres videntur esse species, iudiciales, cautionales, communes..... Cautionales sunt quae instar actionis habent, et ut sit noua actio intercedunt, ut de legatis stipulationes et de tutela et ratam rem haberi et damni infecti.* But the Praetor's jurisdiction was not limited to this.

**sunt casus quibus]** 'there are cases in which'. *Quibus* is of course for *quibus casibus*, and hence *in* is not necessary (cf. *Lat. Gr.* § 1242). Cf. Gai. II. 144 *quibus casibus pater familias intestatus moritur*; III. 34 *quibus casibus*; 179 *nec magis his casibus nouatio fit*; IV. 77 *quibusdam casibus*; II. 146 *hoc casu*; 181 *quo casu*, &c. But also I. 139 *in hoc casu*: D. I. 7. l 17. § 5 *in his casibus*; above l 4, &c.

**cessat]** *Cessare* both in classical and in law Latin denotes inactivity where action might be expected: 'to loiter', 'be idle', 'rest'. Hence of persons: e.g. D. XXVI. 7. l 1. § 1 *Ex quo scit se tutorem datum, si cesset tutor, suo periculo cessat*; XVII. 1. l 38 *si diu in solutione reus cessabit*: of money lying idle, D. XVII. 7. l 13. § 1 *Dicit cessasse pupillarem pecuniam, quod idonea nomina non inueniret*; of arrangements which were not made, D. V. 2. l 17 *cessante cautione repetitio datur* 'if there is no bond'; XXV. 2. l 17. pr. *ubicumque cessat matrimonium, cessare rerum amotarum actionem* 'if the marriage is not valid'; frequently as here of an action not lying, e.g. IX. 2. l 49. § 1, &c. (It does not, like the English 'cease', imply that the thing, having existed or acted, exists or acts no longer.)

The Aquilian action is not always applicable, because the usufructuary may do no positive act leading to the injury (which the Aquilian law requires), but may neglect to do what he ought to do. Negligence rarely comes under the Aquilian statute; see however D. IX. 2. l 8. pr.; l 27. § 9, where the negligence accompanies a positive act. Cf. Vangerow, *Pand.* III. p. 582; Hasse, *Culpa* pp. 21, 134, 283 ed. 2.

**Aquilae actio]** i.e. *legis Aquil. actio*, the action granted by the Aquilian statute.

**eius arbitrato utatur]** 'that he may exercise his usufruct subject to what the judge may think right'. So also Steph.

**qui agrum non proscindit]** cf. Varr. *R.R.* I. 27 *Uere sationes quaedam fiunt; terram autem proscindere oportet*; ib. 29. § 2 *Terram cum primum arant, proscindere appellant*; Col. III. 13. § 4 *Nonnulli omnem uitam per denos pedes in quincuncem disponunt, ut more noualium terra transversis aduersisque sulcis proscindatur.* The legal effect of this is only that, if in the particular case ploughing up new land is within the meaning of *recte colere* (cf. l 9. pr.), the usufructuary may be compelled to do it; and the mode of compulsion is by action on the praetorian stipulation, as the *lex Aquilia* does not apply (nor the interdict *quod vi aut clam*).

**qui uites non subserit]** 'who does not plant vines in place of those dead', &c. Cf. Col. IV. 15. § 1 *Plurimum interest adhuc noua consitione*



*pedamen omne uestiri; nec mox uineam tum subseri, cum fructus capiendus est* (where a special case only is referred to). The word appears not to be used elsewhere.

**aquarum ductus corrumpi]** *Corrumpi, corruptus* are frequently used of what is in any way ruined or spoilt. Thus *ruptum* in the *lex Aquilia* was interpreted by the more general word *corruptum*; Gai. III. 217 (restored by aid of Just. IV. 3. § 13) '*ruptum*' *intelligitur quod quoquo modo corruptum est: unde non solum usta aut fracta, sed etiam scissa et contisa et effusa et quoquo modo uitata aut perempta aut deteriora facta hoc uerbo continentur*. So below 1 50 of a ruined building *uillam uetustate corruptam*; of a foundrous road D. XLIII. 19. 1 3. § 12 *Corrupto itinere minus commode frui (iri conj. Mommsen) aut agi potest*; Hor. Sat. I. 5. 95 *longum carpentes iter et factum corruptius imbri*; of watercourses, Frontin. Aq. 120 *Nascuntur opera ex his causis: aut in potentia ('greed') possessorum quid corrumpitur aut uetustate aut ui tempestatium aut culpa male facti operis... Fere aut uetustate aut ui (tempestatium eae) partes ductuum laborant, quae arcuationibus sustententur aut montium lateribus adplicatae sunt*. Again § 127; D. XLIII. 21. 1 1. § 6 (quoted above 1 7. § 2 *reficere* p. 58). It is used of the atmosphere being polluted, below § 6; of moveables in general, 1 15. § 3; of a skilled slave, 1 17. § 1.

**eadem et in usuario dic. sunt]** 'the same rule applies to the case of one who has the bare use'. Of course the different positions of a usuary and a fructuary give a different result. The usuary having a very restricted right to produce (cf. D. VII. 8. 1 10. § 4; 1 12; 1 15. pr.; 1 22. pr.) would be more likely to be liable under an action for theft; and, as the duty of repairs is often shared with the proprietor, he would be less likely to be chargeable with negligence. The remedy, by stipulation, was the same. *Usu legato si plus usus sit legatarius quam oportet, officio iudicis qui iudicat quemadmodum utatur, quid continetur? ne aliter quam debet utatur*; a somewhat oracular reply (ib. 1 22. § 2 Pompon.).

§ 3. **duos fructuarios]** Such cases are often mentioned: the second title of this book treats of one aspect of them, that of accretion.

**quasi com. diu. iud. dari]** 'that a trial analogous to that for partition of common goods should be granted'. What is here described as *quasi c. d. iud.* is in D. X. 3. 1 7. §§ 6—8 called *utile c. d. iudicium*. The regular *c. d. iud.* was applicable only for dividing corporeal things (ib. 1 4. pr.), but the Praetor allowed a trial of the same nature for the partition of a pledge between the pledgees; or of a usufruct; or of a right to hold property as a security for the payment of legacies (these not being *res* but *iura in re*); as also for recovery of a share of the expenses incurred on a common object (ib. 1 9), or profit received by another from a common object (1 11). See also ib. 1 6. pr.; § 1; 1 11. For the *com. diu. iud.* see note above on 1 6. § 1 (p. 50). The various modes of dividing a usufruct are given in D. X. 3. 1 7. § 10 (cf. p. 47).

*Quasi* is very frequently used to denote an analogous relation, or liability,

or action; e.g. D. iv. 2. 1 21. § 6 *Si metu coactus repudiem hereditatem, praetor mihi succurrit, aut utiles actiones quasi heredi dando, aut &c.*; I. 9. 1 7. pr. *Emancipatum a patre senatore quasi senatoris filium haberi placet*; XXIII. 3. 1 39 *Si serua seruo quasi dotem dederit* (where quasi belongs to *dotem*); XXIV. 1. 1 32. § 27 *quasi meritis, quasi ad uxorem*. So the usufruct of consumable things was a *quasi usus fructus* (D. vii. 5. 1 2. § 1); and some actions were *quasi ex contractu*, others *quasi ex maleficio* (XLIV. 7. 1 5. § 1 sqq.). Cf. xv. 1. 1 52. pr. *Qui tutelam quasi liber administrabāt, seruus pronuntiatus est... Quia de peculio actio deficit, utilis actio in dominum quasi tutelae erit*; XLVII. 2. 1 50. § 4, 1 51 *Cum eo qui pannum rubrum ostendit fugauitque pecus, si praecipitata sint pecora, utilis actio damni iniuriæ quasi ex lege Aquilia dabitur*. In the time of the formulary procedure such actions would be introduced by a fiction, cf. Gai. iv. 34—38.

**uel stipulatione, &c.]** Instead of an actual division of the usufruct, the Praetor might direct the disputants to enter into reciprocal agreements defining the mode of exercise of their respective rights. The same method is referred to as one which a *iudex com. diu.* might adopt. See D. x. 3. 1 7. § 10 (given under *sociis* p. 47); and generally D. XLVI. 5. 1 1.

**ad arma et rixam]** Disputes about the possession of land often led to armed force being used (cf. Cic. *Tull.* 9. § 21; *Caecin.* 8. § 22; Sen. *Dial.* 10. 3. § 1), which was severely dealt with by the Praetor. *Qui dies totos aut uim fieri uetat aut restitui factam iubet, qui de fossis, de cloacis, de minimis aquarum itinerumque controuersiis interdicet* (cf. D. XLIII. 19—23), *is in atrocissima re quid faciat, non habebit?* et C. *Pisoni domo tectisque suis prohibito per homines coactos et armatos, praetor quemadmodum more et exemplo opitulari possit, non habebit?* (Cic. *Caecin.* 13. § 36). Accordingly the Praetor in the case of *uis* gave an injunction to restore, provided the plaintiff had obtained possession *nec ui nec clam nec precario* from the other. In the case of *arma* or *uis armata* this proviso was omitted, so that the order to restore was absolute (Gai. iv. 154, 155). Justinian assimilated the first to the more severe interdict. See D. XLIII. 16; Vangerow, *Pand.* § 690 (III. p. 600 sqq.). A usufructuary could obtain this injunction *de ui et ui armata* (D. XLIII. 16. 1 3. §§ 13—18).

§ 4. **causam proprietatis]** ‘the position or rights of the (bare) owner’. For this sense of *causa* cf. D. II. 14. 1 27. § 2 *Nec dicendum est deteriores condiciones dotis fieri per pactum; quotiens enim ad ius, quod lex naturae eius tribuit, de dote actio redit, non fit causa dotis deterior* (it is found similarly interchanged with *condicio* in Gai. III. 126, 127); XXXII. 1. 30. § 3 *Si fundum mihi uendere certo pretio damnatus es (i. e. by will) nullum fructum eius rei ea uenditione excipere tibi liberum erit, quia id pretium ad totam causam fundi pertinet*. Where *causa omnis* has to be restored to a successful plaintiff, it is defined as all that he would have had, if the thing had been given up to him at the commencement of the suit. D. VI. 1. 1 20; cf. I. 17. § 1; XII. 1. 1 31. pr.; XLIII. 16. 1 1. § 31, &c. See above note on *restitutio* p. 47.

**et aut fundi, &c.]** This is the first of the species of usufructs which are discussed in order (see note on l 13. pr. *nam sicuti* p. 97). We ought to have subsequently *aut aedium* (§ 7), *aut domus* (§ 8), *aut mancipiorum* (l 15. § 1), &c.; but the turn of phrase is altered, *sed si aedium* (§ 7), *item si domus*, &c. Similarly in D. xxxvi. l. 1 38 (37). pr. (also from Ulpian) we have *aut re ipsa* followed by *sed et si* several times. Kühner, *Ausführl. Gram. Lat.* § 158 fin. gives like *anacolutha* from Cicero.

Further *aut fundi* is in fact the hypothesis or condition, to which the answer or apodosis is given by the words *et non debet*; just as in the next sentence *si forte* is answered by *non debebit*. This use of *et* is somewhat similar to its use in Verg. *B.* III. 105 *Dic quibus in terris inscripti nomina regum nascentur flores, et Phyllida solus habeto*; also *Geor.* II. 80 *nec longum tempus, et ingens...ad caelum arbor*. Cf. Dräger, *Hist. Synt.* § 311. 16 (II<sup>2</sup> p. 26).

**arbores frugiferas]** *Frugifer* is usually applied to land capable of producing *fruges*, i.e. corn, pulse, &c. (cf. Plin. *N. H.* XVIII. § 48). So in Cic. *T. D.* II. 5. § 13; Plin. *N. H.* xv. § 8 *Excepto Africae frugifero solo, Cereri totum id natura concessit*; Ov. *Met.* v. 656 *frugiferas messes* in connexion with Ceres. In *Off.* III. 2. § 5 Cicero says *cum tota philosophia frugifera et fructuosa, nec ulla pars eius inculta ac deserta sit*, the first epithet is taken from corn, &c., the other from vines, olives, apples (*poma*), &c. But *frugifer* is also used of trees; cf. Pseudo-Ov. *Nux* 19, where, after contrasting vines, olives, and apples with barren planes *Nos quoque frugiferae, si nux modo ponor in illis*, &c., and Plin. *N. H.* XII. § 14 says that cherries, peaches and others with Greek names are foreign, but that any of them that are now *incolarum numero, dicentur inter frugiferas*. In the table of contents in Book I. he says *Libro XIII. continentur fructiferae arbores* (this book treats only of the vine); *Libro xv. continentur naturae frugiferarum arborum* (this book treats of olives, *poma* of all kinds, figs, cherries, &c.). So that the words must have been used somewhat loosely, as there seems to have been also a loose use of *frugem*; cf. D. L. 16. l 77 where however Mommsen suggests *fructum*. *Frugifer* occurs once more in the Digest XLIII. 24. l 16. § 1 *Si quis vi aut clam arbores non frugiferas ceciderit, veluti cupressos, domino dumtaxat* (i.e. not to the fructuary as well) *competit interdictum*.

**excidere]** 'to cut to the ground' as opposed to clipping, cf. D. XLIII. 27. l 1.

**diruere]** 'to pull down', 'pull to pieces'; cf. D. XLVII. 3. l 1. pr.; XXXIX. 2. l 24. § 10.

**in perniciem proprietatis]** 'to the ruin of the (bare) owner's interest'. If we translated 'to the ruin of the property' the general meaning would be quite correct, just as *causam proprietatis* (just above) might be translated 'character of the property': only that property in England has come to mean the land itself instead of the right, as 'estate' in law means the legal right, in ordinary language, the land. *Proprietas* in Latin had not



thus become concrete. It meant the ownership, not the acres owned. But what injures the land as a desirable object injures the ownership.

**uoluptarium**] An estate for pleasant residence, as opposed to one worked for profit; in fact 'a residential estate'. *Uoluptariae impensae* are described in D. L. 16. 1 79. See note above on 1 7. § 3 (p. 66).

**fruit**] 'has been', i.e. before the legatee comes to it. The previous character of the object was a kind of standard for the use of the fructuary.

**uirdiaria**] 'greeneries', or small gardens or shrubberies in or close to a house. The word is spelt as here below § 7; D. xxxiii. 7. 1 8. § 1; Lamprid. *Heliog.* 23; but *uirdiaria* in D. xxxiii. 7. 1 26; Ulp. vi. 17; Plin. *N. H.* xviii. § 7; Sueton. *Tib.* 60; *uirdaria* in Cic. *Att.* ii. 3. § 2; Petron. 9. In Appendix to Prob. p. 199. 9 ed. Keil we find '*uirdis non uirdis*', in correction of what no doubt was a contraction in popular speech. See my *Lat. Gr.* § 245.

In D. viii. 2. 1 12 *uirdia* 'plants in pots' &c. on the top of a house are spoken of. Cf. D. viii. 1. 1 15. § 1; Plin. *Ep.* v. 6. § 17 *ambulatio pressis uarieque tonsis uiridibus inclusa*, i.e. with hedges clipped into different shapes; ib. § 38, § 40; Vitruv. v. 9. § 5 *Media uero spatia, quae erunt sub dio inter porticus, adornanda uiridibus uidentur, quod hypaethrae ambulationes habent magnam salubritatem*, &c.; ib. vi. 6.

**gestationes**] 'alleys' in which a person was carried in a sedan, sometimes straight, sometimes running round a vineyard or shrubbery. Plin. *Ep.* i. 3. § 1; ii. 17. § 14; v. 6. § 17; ix. 7. § 4. See Mayor ad Juv. i. 75 ed. 2.

**deambulationes**] 'walks'. The compound is in Ter. *Haut.* 806 used of the exercise, not of the place where the exercise was taken. The simple form *ambulatio* is often used for the place, e.g. Cic. *Q. F.* iii. 1. § 1 *Nihil ei restabat praeter balnearia et ambulationem et auiarium*; § 5 *Topiarius omnia conuestiuit hedera, qua basim uillae, qua intercolumnia ambulationis*; iii. 7. § 1 *Crassipedis ambulatio ablata* (by a flood); Varr. *R. R.* iii. 5. § 9 *Circum huius ripas ambulatio sub dio, pedes lata denos*; Colum. i. 6. § 2; Vitruv. and Plin. *Ep.* cited in note just above. The preposition *de* in these compounds implies formally or methodically, cf. *decurrere*, of troops in a review; *declamare*, *denominare*, *denuntiare*. One who had only a *usus* was entitled to walk or be carried in the walks of the villa, *deambulandi quoque et gestandi ius habebit* (D. vii. 8. 1 12. § 1).

**deicere**] 'throw down', applying both to the trees and any columns or structure which might surround or cover the walks, &c. So below § 5; vii. 6. 1 2 *qui arbores deiecisset aut aedificium demolitus esset*. It may well here be understood to cover all disturbance of arrangements of a permanent nature.

**hortos olitorios**] 'vegetable gardens'. Cf. D. L. 16. 1 198 *Hortos quoque, si qui sunt in aedificiis constituti* (among buildings), *dicendum est urbanorum* (sc. *praediorum*) *appellatione contineri. Plane si plurimum horti in reditu sunt, uinearii forte uel etiam holitorii, magis haec non sunt*

*urbana*. Columella x. 1. § 2, § 3 speaks of the rise of prices in meat having made vegetable gardens more important. Horace speaks of the substitution of flower gardens, &c. for vines and olive beds, *platanusque caelebs euincet ulmos; tum uiolaria et myrtus et omnis copia narium spargent oliuetis odorem fertilibus domino priori* (*Od.* II. 15. 4 sq.).

**quod ad reditum spectat**] 'which aims at a return', i.e. is laid out to produce what will sell rather than what will please the eye, &c.

§ 5. **lapidicinas**, &c.] See above on l 8. § 2 (p. 69). 9/

**instituere**] 'set on foot', of mines and quarries, 'open'. Cf. Liv. xxxix. 24 *Metalla et uetera intermissa recoluit et noua multis locis instituit*.

**huic rei**] must be taken with *occupaturus*, *necessariam* being absolute. 'If he has not to take for this purpose a necessary part of the land', i.e. a part necessary for the working of the land as it is already laid out, whether for vines or grain crops or other purpose. Agriculture did not include mining, nor even working stone quarries and sand pits (Varr. *R. R.* 1. 2. §§ 22, 23).

**proinde**] 'accordingly' 'wherefore', cf. l 15. § 5; l 25. § 2; D. iv. 1. l 6; &c. Gaius uses *proinde* only with *ac*, *ac si*; see note on l 20.

**uenas inquirere**] to discover beds of stone, strictly veins of (i.e. suitable for) stone quarries. For *inquirere*, cf. Gai. II. 44 *Cum sufficeret domino ad inquirendam rem suam anni aut biennii spatium*.

**metallorum**] See note on l 8. § 3 (p. 70).

**sulpuris**] used for medicine; also *ad lanas suffiendas*, *quoniam candorem mollitiemque confert...Habet et in religionibus locum ad expiandas suffitu domus* (Plin. xxxv. §§ 175—177).

**aeris**] 'copper', but the word was also used for compounds of copper, e.g. bronze, which is copper with tin. The Roman coinage was of copper with an average of 7 per cent of tin and 23 per cent of lead (Hultsch, *Metrol.* § 33. 5 p. 196).

**quas pater familias instituit**] 'which the master opened'. In this case the *paterfamilias* would be the testator or other creator of the usufruct. The term is apparently a conversational one to denote the owner or disposer. See above l 9. § 7 (thrice); v. 3. l 54. § 2 *Cum praedia urbana et rustica negligentia possessorum peiora sint facta, ueluti quia vineae, pomaria, horti, extra consuetudinem patris familiae defuncti culta sunt*; xi. 7. l 4; xxxiii. 7. l 16. § 2; l 18. § 1; xxxv. 2. l 90; l. 16. l 203 where in defining slaves imported for one's own use, the question is put *utrum dispensatores... operarii quoque rustici qui agrorum colendorum causa haberentur, ex quibus agris pater familias fructus caperet, quibus se toleraret*, &c. are included; Cato, *R. R.* 2. § 1; Colum. ix. 1. § 3; Paul. *Sent.* III. 5. § 39; see also note on l 9. § 2 (p. 70); and the use of *dominus* in l 27. § 1.

**si forte**, &c.] 'if perchance there should be more profit to be got in this mine which he has opened, than in the vineyards and plantations and oliveyards which were there before'.

**arbustis**] *Arbustum* is chiefly used in connexion with vines, and means regularly planted rows of trees intended to bear vines. They often had

corn or other crops between the rows. Cf. Col. II. 2. § 24 *In Italia arbustis atque oleis consitus ager altius resolui ac subigi desiderat, ut summae radices vitium olearumque uomeribus rescindantur, quae si maneant, frugibus obsint*. The trees were chiefly elms and ashes, because their leaves were liked by cattle, but also poplars and maples (*opulus*). See Col. v. 6. Cato puts an *arbustum* last but one in the order of profit, the order being vineyard, garden, withybed, oliveyard, meadow, cornland, underwood, plantation, acornwood. See note on *silua caedua* l 10 (p. 77).

**forsitan etiam haec, &c.]** The difference of this case from that in § 4 is clear. In that section the fructuary of an ornamental estate is forbidden to convert it into an estate worked merely for profit. In this section a farm worked for profit is assumed: the fructuary is allowed to work mines previously opened, and even to open new ones, if it can be done without interfering with the regular farming of an estate. Then comes the question: what if the mines, if extended, should be more profitable than the farm continued as of old? Ulpian says somewhat doubtfully (*forsitan*) that possibly the transformation (partial or entire) of the estate from farming to mining may be allowed. The whole circumstances of the case would have to be weighed, and the act of the fructuary in changing the character of the estate, not from a residential estate to a profitable one, but from one mode of profitable working to another, may be justified. This interpretation seems to be confirmed by Bas. *δύνатаι δὲ συνιστᾶν ἐν τῷ ἀγρῷ παντοῖα μέταλλα, μὴ βλάπτων τὸν ἀγρόν· εἰ μὴ ἄρα μείζων ἐστὶ τῆς βλάβης ἢ περιποιουμένη πρόσσδος*.

There has been a great deal of discussion about the passage from early times, which may be seen in Glück IX. p. 239 sqq., and Vangerow, *Pand.* § 344, Anm. 2 (vol. I. p. 736). Both these writers understand the passage to relate to only a partial transformation of the estate, i.e. to a change of some portions of the estate from vineyard to mine. So also Elvers, *Serv.* p. 472, Wächter, *Pand.* § 154 (II. 233). I do not feel sure that the limitation to a part is necessary. That view seems to rest partly on a somewhat strained application of *salua substantia* in l 1 (which I take merely to distinguish a *ususfructus* from a *quasi-ususfructus*), and partly on applying here what Ulpian says only of a residential estate (supr. § 4). But very likely the partial transformation of an estate would be more easily justified than a complete change. Yet if an unsuspected bed of minerals were found and all the neighbouring estates were worked for that, an entire transformation might be what a *bonus paterfamilias* would do and approve. Nothing seems to be said of the course of obtaining the bare owner's consent. But that must have been possible, and might create an obligation: it would not affect the absolute legal rights. See note on l 15 fin. (p. 125).

**si quidem]** 'if, as is the fact', 'since'.

§ 6. **caelum corrumpant agri]** 'pollute the sky of the farm', i.e. vitiate the air, referring to smoke or chemical fumes. Cf. Lucr. VI. 1133 (of pestilence) *Nec refert utrum nos in loca deueniamus nobis aduersa et*



*caeli mutemus amictum, an caelum nobis ultro natura corruptum deferat; D. XLIII. 23. l 1. § 2 Nam et caelum pestilens et ruinas minantur immunditiae cloacarum, si non reficiantur.*

I understand this as a limitation only so long as the estate is carried on as a farm, and to apply to the atmosphere of the particular estate only, not to land generally.

**opificum]** 'artisans' D. XXXIX. 1. l 5. § 3 *fabris uel opificibus; L. 13. l 1. § 7 ceterarum artium opificibus siue artificibus; Cic. Off. I. 42. § 150.*

**legulorum]** The inferior mss. have *figulorum* which is certainly attractive, though possibly due only to conjecture. For *legulus* 'gatherer' cf. Varr. *L. L.* VI. 66 *ab legendo leguli qui oleam aut qui uinas legunt; Cato R. R.* 144 § 3 (of olive picking) *legulos quot opus erunt praebeto et strictores.* It is also found (see De Vit's *Lex.* s. v.) of goldpickers in an inscription found near Zalatna in Transylvania, *Corp. Inscr. L.* III. No. 1307 *Leguli aurariarum:* called *aurileguli* Cod. Theod. x. 19. l 9; l 12. The reference of the word here to goldpicking is old; see Glück IX. 245 n. *Murileguli* (pickers of *murex*) and *conchylileguli* are also spoken of in Cod. Theod. x. 20. l 5; l 16; l 17. But further if Ulpian's words (*quae instituit*) are taken generally to refer to any new arrangements set up by the fructuary, e.g. turning meadow into olive or vineyards (cf. Wächter, *Pand.* II. p. 233), and not merely to mines and quarries, *leguli* may perhaps be taken in its more usual application. The objections that I see to this are, first, that Ulpian's words more naturally relate to mines, and, secondly, that olive pickers, &c., are not a standing charge, but only hired for the harvest, and hired only in proportion to the crop, and therefore the charge is recompensed by the yield.

**quae non potest sustinere propr.]** So in the case of a mortgagee in possession D. XIII. 7. l 25 *Sicut enim negligere creditorem dolus et culpa quam praestat non patitur, ita nec talem efficere rem pignoratam, ut grauis sit debitori ad recipiendum.*

**positurum]** sc. *scribit Iulianus*, or something of that kind.

§ 7. **lumina immittere]** 'put in lights', i.e. make windows. Cf. D. VIII. 2. l 40.

**colores]** 'colours' with which the walls are stained. The pigments were mineral (Becker's *Gallus* ed. Göll, II. p. 303). See Vitruv. VII. 7 sqq.; Plin. XXXV. § 29 sqq.

**picturas]** 'paintings' on and in the wall plaster D. XIX. 1. l 17. § 3 *Quae tabulae pictae pro tectorio includuntur, itemque crustae marmoreae, aedium sunt.* Cf. Plin. XXXV. § 116; Vitruv. VII. 5.

**marmora]** marbles, i.e. slabs inserted in the walls, or flooring. Cf. Sen. *Ep.* 115. § 9 *miramur parietes tenui marmore inductos; ib.* 86. § 6. Fest. p. 242 *pauimenta Poenica marmore Numidico constrata significat Cato.*

**sigilla]** 'statuettes' or reliefs D. XIX. 1. l 17. § 9 *Item constat sigilla columnas quoque et personas et quorum rostris aqua salire solet, uillae esse.* Often made of plaster of Paris (Plin. XXXVI. § 183).

All these accusatives depend on *immittere* understood from the preceding clause, which will therefore refer to letting into the walls or fixing to them these pictures, &c. On the law see above 1 7 fin.

**si quid ad d. orn.]** 'anything for ornamenting the house'. *Si quid* is used almost absolutely: *si quid...pertinet* would be the full construction.

**sed neque]** It is noticeable that this is not followed by another *neque* but by *uel...aut...uel...ue...uel*, &c. So in English we often use 'or', where 'nor' would be more strictly correct. The main particle here is *uel*: *aut* is used for the strong contrast of *coniungere* and *separare*, and *-ue* for the subordinate division of *aditus* and *posticas*. *Neque* here, I think, looks forward, not as frequently in these writers (e.g. *nec obstruere* below) backward. For the preceding sentence is affirmative (*sed et*).

**diaetas]** 'rooms', or 'suites of rooms' whether parlours or sleeping rooms. See Plin. *Ep.* II. 17. §§ 12, 15, 20, 24; v. 6. §§ 20, 21, 27, &c.; D. VII. 4. 1 12; xxx. 1 43. § 1; xxxii. 1 55. § 3.

**transformare, &c.]** He is not permitted to change the rooms (i.e. to change the fittings so as to suit them for a different destination), or join them or separate them (i.e. remove or put up partywalls or doors).

**aditus posticasue uertere]** 'to reverse the front and back entrances'? But *aditum uertere* is used in Liv. xxxix. 14. § 2 of turning the entrance of an upper story, so as to enter from inside the building instead of from outside. For *postica* comp. Hor. *Ep.* I. § 31 *Atria seruantem postico falle clientem*.

**refugia aperire]** 'to open retreats': apparently to throw open, by removing a roof or a wall, &c., some quiet concealed passage or room in the house. Noodt I. cap. 11 (referring to Casaubon on Spart. *Hadr.* 10) takes it of underground rooms and passages constructed to avoid the heat (cf. Plin. v. 6. § 30), or to avoid cold (Tac. *Germ.* 16). The word is used in D. xi. 3. 1 2. § 2 (of harbouring other persons' slaves) *Est proprie 'recipere' refugium abscondendi causa seruo praestare uel in suo agro uel in alieno loco aedificiue*, but there it is not in a strictly concrete sense.

**atrium mutare]** By changing the hall is probably meant changing it from a simple construction of a roof with cross beams to one with the beams resting on pillars of an ornamental kind, or *vice uersa*. Of four adjoining houses in Pompeii two have the simpler form (*atrium Tuscanicum*) two have an *atrium Corinthium*, one with 12 and the other with 16 pillars. Another change might be to have no *compluiuium*, but the whole area to be roofed (*atrium testudinatum*); cf. Vitruv. vi. 3; Hor. *Od.* III. 1. 45 *Cur inuidendis postibus et nouo sublime ritu moliar atrium?* See Marquardt, *Priv. Alt.* p. 232 ed. 2.

**uiridaria...conuertere]** Mention is frequently made in the Latin writers of shrubberies or gardens close to or in a house (e.g. Hor. *Ep.* I. 2. 22 *Nempe inter uarias nutritur silua columnas*) and these would be susceptible of a great deal of change. See above under § 4 (p. 107).

**excolere]** 'improve'. Cf. below 1 44, which lays down the same rule as

this. *Excolere* is also used of farms D. VI. 1. l 53; of a mountain pasture XIII. 1. l 25 *Salutem grandem, acceptum pignori, excoluisti sic ut magni pretii facias*.

**quamvis lumina non obscurentur**] 'even though the lights are not interfered with'. Probably this refers to neighbours' lights, but it may be that some lights in the house itself might be interfered with by raising part of the house higher.

**quia tectum magis turbatur**] sc. *uento*; 'because the roof is more liable to be disturbed'. So Glück IX. pp. 249, 250. Noodt I. cap. 11 takes it, wrongly I think, of an objection to disturbance with the roof-arrangements made by the owner.

**quod Labeo, &c.**] 'and this Labeo notices also in the case of the proprietor', viz. that he cannot raise the roof. So in l 7. § 1. The proprietor cannot make the position of the usufructuary worse (below l 16), but this is limited to direct alteration of the thing itself. An indirect interference is allowed, see l 30.

**idem Nerua**] 'the same Nerva', i.e. *Nerva filius*.

**nec obstruere eum posse**] 'that he (i.e. the fructuary) cannot block up lights either', i.e. the lights of the house of which he has the usufruct. Besides any structural change that this might imply, the non-use of lights for a certain time might free a neighbour from a servitude. Cf. D. VIII. 2. l 6 *Si aedes tuae aedibus meis seruiant ne altius tollantur, ne luminibus mearum aedium officiat, et ego per statutum tempus fenestras meas praefixas habuero uel obstruxero, ita demum ius meum amitto, si tu per hoc tempus aedes tuas altius sublata habueris. Obstruere luminibus* is used in Cic. *Dom.* 44; and metaphorically in *Brut.* 17. § 66; *Corp. Inscr. Lat.* I. 1252 *ius luminum obstruendorum redemerunt*.

§ 8. **domus**] At first sight this appears to be opposed to *aedium*, which was used at the commencement of § 7 and again lower down in that section. But *ad domus ornatum* was there used of the *aedes*. *Aedes* was originally in sing. 'a hearth', hence a single room, and thus appropriate to a temple: in plur. a set of hearths or rooms, hence a house. *Domus* is a dwelling, a residence, and is opposed to *insula* a house let out as lodgings; and in this character was perhaps chosen in our passage. See next note.

**meritoria**] so. *oenacula* 'hired apartments'. Cf. Juv. III. 234 *Nam quae meritoria somnum admittunt: magnis opibus dormitur in urbe*; D. XLVII. 10. l 5. § 5 *Tantum igitur ad meritoria uel stabula non pertinebit lex Cornelia: ceterum ad hos pertinebit, qui inhabitant non momenti causa, licet ibi domicilium non habeant* (the *lex Cornelia* gave an action for forcible entry into a man's *domus*. Ulpian says it applies not only to one's home, but also to any fairly permanent residence; not to a transitory lodging); XVII. 2. l 52. § 15 of a man's lodging when travelling. See also a few lines below. The word is generally used of poor lodgings (cf. Val. Max. I. 7. Ext. 10 *in tabernam meritoriam deuertit*; Suet. *Vit.* 7 quoted in next note), and in later Latin of brothels, e.g. Spart. *Pescen.* 3. § 10 *Milites tui uagantur*



*tribuni medio die lauant, pro tricliniis popinas habent, pro cubiculis meritoria.*  
(See the *lexx.*)

**nec per cenacula diuidere domum**] 'not to divide it into suites of rooms'. Cf. D. XIX. 2. l 30. pr. *Qui insulam triginta* ('for 30,000 sesterces') *conduxerat, singula cenacula ita locauit* (conduxit F), *ut quadraginta ex omnibus colligerentur*; Suet. *Uit.* 7 *Tanta egestate* (fuit) *rei familiaris, ut, uxore et liberis quos Romae relinquebat meritorio cenaculo abditis, domum in reliquam partem anni ablocaret.*

**atquin**] 'but', the same as *atqui*. The form *atquin* is found in Cic. *Dom.* 5. § 12; *Phil.* x. 8. § 17 and frequently in the Digest (e.g. IV. 3. l 18. § 3; XII. 2. l 42. § 1) and Tertullian. See Neue, *Formenlehre* II. p. 802 ed. 2.

**locare**] One who had the mere *usus* could not let (D. VII. 8. l 8; l 11); the rent being regarded as a *fructus*. See note on *omnis fructus*, p. 54.

**quasi domum**] 'as a house'; i.e. he must not let it off into separate lodgings, nor for other purposes than that of a residence.

*Quasi* is here used without any *fictitious* assumption, or allegation, or analogy. So also not uncommonly, e.g. l 9. § 2; l 48; D. I. 16. l 7. § 2 *Cum plenissimam autem iurisdictionem proconsul habeat, omnium partes, qui Romae uel quasi magistratus uel extra ordinem ius dicunt, ad ipsum pertinent*, i.e. in the capacity of magistrates; XXIII. 3. l 5. § 6 *Si pater, non quasi pater sed alio dotem promittente, fideiussit et quasi fideiussor soluerit* (i.e. in the character of surety); ib. § 12; XXXVI. 1. l 61 (59) fin. *quia non quasi heres sed quasi mater ex pacto accepit*; XLVIII. 19. l 9. § 15 *si, posteaquam (decurio) plebeius factus est, tunc suscipiat filium, quasi plebeio editus, ita erit (a criminal son) plectendus.*

**balineum**] 'a public bath'. The distinction of *balneum* for a private bath, *balneae* for public baths is ante-Augustan only (Marquardt, *Priv.* Alt. p. 265). Rules for baths to be supplied by a contractor in a mine in Lusitania are contained in an inscription lately found (*Lex Metallii Uipascensis*, Bruns p. 141, ed. 4). The supply of baths *gratis* was one form of liberality, and sometimes the subject of an endowment, e.g. D. XXXII. l 35. § 3 *Codicillis confirmatis ita cavit: Tiburtibus municipibus meis... balineum Iulianum iunctum domui meae, ita ut publice, sumptu heredum meorum et diligentia, decem mensibus totius anni praebeatur gratis*; XXXII. l 91. § 4; XIX. 2. l 30. § 1 *Aedilis in municipio balneas conduxerat, ut eo anno municipes gratis lauarentur.* See inscriptions in Wilmanns' index s. v. *balneae* (II. p. 658). Baths for hire were also owned by private persons, e.g. Cic. *Or.* II. 55. § 223; Plin. *Ep.* II. 17. § 26 *In hoc uico balinea meritoria tria, magna commoditas, si forte balineum domi uel subitus aduentus uel breuior mora calfacere dissuadeat.* The great change involved in turning a dwelling-house into a bath-house is illustrated by the legal effect of the converse given in D. VII. 4. l 12. pr. *Si cui balinei ususfructus legatus sit et testator habitationem hoc fecerit, uel si tabernae, et diaetam fecerit, dicendum est usumfructum extinctum.*

On the spelling, see Ritschl *Opusc.* iv. p. 175 who says Plautus wrote *balineas* but *balneator*, if mss. are to be trusted. Later writers used both forms *balneae*, *balineae*; *balneum*, *balineum* (Koffmane, *Lex.* p. 21).

**quod autem dicit**, &c.] ‘when he (*Nervæ filius*) says that the usufructuary will (i.e. must) not let rooms for hire, you must take him to mean, he must not make an inn or laundry (?) of it’. It might be allowed to have lodgers of a permanent character, but not to make it a common lodging-house for chance travellers.

For this use of *quod* to introduce a matter for remark, see my *Lat. Gram.* § 1749.

**deuersoria**] *deuerti*, *deuertere*, *deuersorium*, &c. (also written *diuers.* &c.) are used of putting up for a night, or short stay, either at a friend’s house, or an inn. Cicero even speaks of buying a *deuersorium* (*Fam.* vii. 23. § 3). Cf. Varr. *R. R.* i. 2. § 23 *Si ager secundum viam et opportunus viatoribus locus aedificandæ tabernæ deuersoriæ*, which he implies would be profitable. *Taberna deuersoria* also in Plaut. *Merc.* 436. *Deuersorium* is generally used of inns, which were poor, e.g. Auct. *ad Herenn.* iv. 51; Liv. xlv. 22. § 2 where Rhodian ambassadors complain *Antea ex publico hospitio in curiam gratulatum vobis, nunc ex sordido deuersorio, vix mercede recepti, uenimus*; Petron. 15; 124; Suet. *Uitell.* 7 *Uitellius per stabula ac deuersoria mulionibus ac viatoribus præter modum comis*; Ner. 38 *quæ vulgo...appellant* means that the ordinary term for what Nerva alluded to under *meritoria* is *deuersoria aut fullonica*.

**fullonica**] sc. *loca* or *cenacula*, as a neut. plur. is only found here, unless the word as it occurs in several receipts recently found at Pompeii is correct, and not a mutilated or abridged form for *fullonicam* (as Mommsen and others take it). In other receipts *ob fullonicam* is written (Hermes xii. 121, 126; Bruns p. 219). In the *lex Metall. Uipasc.* we have *tabernarum fulloniarum*. Cato *R. R.* 10. § 5 enumerates among the necessary plant, of very various character, for an oliveyard ‘one *fullonicam*’. Frontin. (*Aq.* 94) has *haec aqua non in aliū usum quam in balnearum aut fullonicarum dabatur*. In Dig. xxxix. 3. 1 3. pr. it is said that a person *in cuius fundo aqua oritur, fullonicas circa fontem instituisse*. In these cases *lacuna* or *taberna* or *officina* ‘a pit’ or ‘workshop’ (cf. Plin. xxxv. § 143 *officina fullonis*) must be understood with the adjectives. (In Cato, Blummer, *Techn.* i. p. 161; Marquardt, *Priv. Alt.* p. 511 take it with *pila*, but this is probably wrong: a trough or tub seems more likely to be Cato’s meaning.) Fullers were in the habit of standing and treading the clothes in the liquid to clean the stuff and make it closer. The adjectives *fullonius* and *fullonicus* seem to be used indifferently. Thus Plautus (*Asin.* 907) has *si non didicisti fullonicam* sc. *artem* (the edd. read *fulloniam* against the mss.) and so also Vitruv. vi. *Prooem.* fin. Pliny has *ars fullonia* (vii. § 196); *creta fullonia* (xvii. § 46) &c.

For the whole of the passage *Item si domus—fullonica appellant* Bas. has simply this οὔτε ἀκρατοπώλια ἢ λούτρον ἢ ἐργαστήρια ποιεῖν μισθοῦν

δὲ ὡς οἶκον δύναται. Heimbach and Zachariae de Lingenthal translate ἀκρατοπῳλία by 'meritoria', I suppose in the belief that the Greek translators derived *meritoria* from *merum* 'pure wine'. Ἐργαστήρια seems to represent *fullonica*. But the use of *fullonica* here is somewhat strange: why select this as an instance of workshops? and why class it with *deuersoria*? and why this periphrasis with *uulgo appellant*?

**et si balineum, &c.]** 'even if there is, quite in the interior of the house or among pleasant rooms (i.e. not among back offices), a bath customarily reserved for the use of the owner'. Ulpian says that the mere existence of a bath in the house is no justification for altering the character of the house in the way alluded to.

**dom. usibus uacare]** So just below *umentis et carruchis uacans. Uacare* in this use 'to be free from everything else, so as to be ready for a particular thing' is common (in the silver age) of persons and of the mind, e.g. Cic. *Div.* I. 6. § 10 *Ego uero philosophiae semper uaco*; Quintil. XII. 1. § 4 *Ne studio quidem operis pulcherrimi uacare mens, nisi omnibus uitiiis libera, potest*; Tac. *Ann.* XVI. 22 *Thrasea priuatis potius clientium negotiis uacauit*: rarely of things, e.g. Verg. *Aen.* XI. 179 *meritis uacat hic tibi solus fortunaeque locus*: nor is it frequent in this sense at all in the Digest, e.g. XVIII. 1. l 51 *Litora nullius sunt, sed iure gentium omnibus uacant*, 'free to everybody'; I. 13. § 2 *hi quaestores solis libris principalibus in senatu legendis uacant*. So Bas. takes our passage τῇ χρήσει τοῦ δεσπότου ὄρισμένον. It is possible to take *usibus* and *umentis* as ablatives dependent on *uacare* 'empty of', i.e. 'not required for', 'not occupied by', but the sense is the same in either case.

**ut publice lauaret]** Bas. ἐπὶ τῷ λούειν δημοσίᾳ. *Lauare* is used as well as *lauari* for bathing, e.g. Plaut. *Most.* 157; *Truc.* 322 *Pisces ego credo, qui usque dum uiuunt lauant, minus diu lauare, quam haec lauat Phronesium. Si proinde amentur mulieres diu quam lauant, omnes amantes balneatores sient*; ib. 328, 330; Ter. *Eun.* 596 *Uentulum huic sic facito dum lauamur: ubi nos lauerimus, si uoles, lauato*; Varr. *L. L.* IX. 107 who mentioning both usages says *e (de?) balneis non recte dicunt 'laui'; 'laui manus' recte*; Liv. XLIV. 6 init.; common in Sueton., *Cal.* 24; *Ner.* 35; *Tit.* 8; *Dom.* 21; Lampr. *Com.* 11; Capitol. *Gord.* 6; Trebell. *Gallien.* 17.

But the impersonal use of *lauet* can only be paralleled by an inscription near Bologna (Wilmanns 2719) containing an advertisement: *In praedis C. Legianni Ueri balineum: more urbico lauatur; omnia commoda praestantur*; and another quoted by Marini, *Atti* p. 532 *balineus: lauatur more urbico et omnis humanitas praestatur* (Wilm. II. p. 209). These seem to justify the use in our passage. Otherwise we should have to read *laurent*, and compare *publice lauent* with *uulgo gratulantur* Cic. *T. D.* I 35. See my *Gram.* § 1428.

For *publice* cf. D. XXXII. I 35. § 3 (quoted above p. 113); I 91. § 4 *Balneas legatae domus esse portionem constabat: quod si publice praebuit, ita domus esse portionem balneas, si per domum quoque intrinsecus adirentur, &c.*



**ad stationem iumentorum]** ‘for quarters for beasts’. Cf. Theod. Cod. VII. 16. 1 2 *Omnes stationes navium, portus, litora*; Vat. Fr. 134 *Arcari Caesariani in foro Traiani habent stationes*. *Statio* is often used of the quarters for soldiers, and of posting-stations. For *iumenta*, see note on 1 3. § 1 (p. 39).

**si stabulum, &c.]** ‘if he let out to a bakery, what was the stable of the house, reserved for beasts and carriages’. Bas. takes *domus* with *iumentis* τὸ στάβλον τὸ ἀφωρισμένον ταῖς ὑποζυγίοις τοῦ οἴκου καὶ τοῖς ὀχήμασιν.

*Stabulum* was the regular word for stalls or stables for animals; and their keepers or riders also put up there or in the same building. Cic. *Sest.* 5. § 12 *Pastorum stabula praedari coepit*; Plin. *Ep.* VI. 19. § 4 *Urbem pro hospitio aut stabulo quasi peregrinantes habent*. Paul. *Sent.* II. 31. § 16 *Quumque in caupona uel in meritorio stabulo diuersorioque perierint, in exercitores eorum furti actio competit*; D. IV. 9 *passim*.

**carruchis]** Elegant four-wheeled carriages (often) drawn by mules, first used in imperial times. Plin. XXXIII. § 140 *carrucas argento caelare inuenimus*. Alex. Severus permitted senators at Rome to have *carrucas argentatas* (Lamprid. *Al. Sev.* 43); Aurelian *dedit potestatem ut argentatas priuati carrucas haberent, cum antea aerata et eburata uehicula fuissent*; D. XXXIV. 2. 1 13 *Quaesitum est, an carrucha dormitoria cum mulis, cum semper uxor usa sit, ei debeatur*; XIII. 6. 1 17. § 4; XXI. 1. 1 38. § 8; Paul. *Sent.* IV. 6. § 91. A stable reserved for a show equipage was not convertible to a bakery without a substantial change.

**pistrino]** The business of miller and baker was combined. The corn was pounded (*pisitur*), and then baked.

1 14. **licet multo minus, &c.]** ‘though he got much less profit from the thing’. Haloander suggests *fructuum*, which seems necessary. The words are ambiguous in reference: is it the letting for a bakery, &c., that gives less profit, or the not letting? The latter is more probable, because the idea is simpler. A fructuary is not justified in a large change of the object by the fact that such a change would be much more profitable. For the house was meant for residence, not as mere material for profit. See above 1 4 and 1 5, which between them give the right rule.

1 15. pr. **sed si, &c.]** ‘if however he have built any addition to the house, he cannot either remove it or break the attachment: what is actually unattached, he can no doubt claim as his own’. The principle of this is clearly expressed in D. XLI. 1. 1 7, though there the position of owner is the reverse of our case. *Cum in suo loco aliquis aliena materia aedificauerit, ipse dominus intelligitur aedificiū, quia omne quod inaedificatur solo cedit. Nec tamen ideo is, qui materiae dominus fuit, desiit eius dominus esse: sed tantisper neque uindicare eam potest neque ad exhibendum de ea agere propter legem duodecim tabularum, qua cautur ne quis tignum alienum aedibus suis iunctum eximere cogatur, sed duplum pro eo praestet: appellatione autem tigni omnes materiae significantur ex quibus aedificia fiunt. Ergo si aliqua ex causa dirutum sit aedificium, poterit materiae domi-*

*nus nunc eam vindicare et ad exhibendum agere.* On *vindicare* and *ad exhibendum agere*, see note on l 12. § 5 (p. 92).

**refigere**] ‘to unfix’. D. XLIII. 24. l 22. § 2; XLVIII. 13. l 10 (8). pr. Bas. has ἀναθεῶν which corresponds to the reading of inferior MSS. *reficere*. But Steph. has ἀποσπᾶν (cf. Heimbach *Bas.* II. p. 184).

§ 1. **mancipiorum**] This is the third species of usufruct dealt with. See above on l 13. § 4 (p. 106).

**usu fructu legato**] I have written *usufructu* (suggested also by Mommsen) for *ususfructus* which the MSS. give. In the parallel sections l 13. § 4, § 7, § 8; l 15. § 4, § 5 we have *ususfructus legatus* (or *legatur*), not a genitive with *legatum sit*: the genitive *mancipiorum* dependent on a genitive *ususfructus* would be awkward; and *abuti legato sed secundum conditionem eorum uti* is again awkward. I take *usuf. legato* as ablative absolute, and understand *mancipiis* with *abuti* and *uti*. ‘If the usufruct in slaves is bequeathed, the usufructuary ought not to spoil them by misuse’. But *abuti* and *uti* may be taken with *usufructu legato* as in l 27. § 2.

**abuti**] This word in classical Latin means (1) ‘to use away from its original or intended or authorized use’, and so far ‘to misuse’ (e.g. Cic. *N.D.* II. 60. § 151; *Att.* VII. 13 b. § 2); (2) ‘to use to the full’, ‘use up’, ‘consume’ (e.g. Cato, *R.R.* 76. § 4; Sall. *Cat.* 13. § 2). The 1st use is found in D. xv. 1. l 41 *Eo uerbo abutimur*; III. 5. l 37 (38) *licentia uidentur abuti*; Cod. Theod. XIII. 5. l 26 *legis indulto abutantur*; possibly in XI. 30. l 21 *ne moris tergiuersantibus abutantur*. But the 2nd use is much more frequent in the law writers; e.g. D. v. 3. l 25. § 11 *perdiderunt, dum re sua se abuti putant*; XXVII. 9. l 5. § 13 *pecunia abutantur* ‘spend the money’; XLVIII. 20. l 6 med. *ea pecunia abuti* (though in both the last two places the 1st use is partly in mind); Cod. Just. v. 12. l 29 *fructibus abutatur*. I take it mainly in this last sense at the end of this section *abuti proprietate*; in § 4; in l 27. § 2, and in our present passage, though there is a mixture of both uses. It means ‘to spoil by use’, ‘to destroy the proper character of the thing by the improper use made of it’. This is in accordance with the general principle of usufruct that it must not be destroyed in use (*salua rerum substantia*); with the reference in § 6 to the case of a quasi-usufruct; and with the regular meaning of *abusus* ‘consumption in use’, Cic. *Top.* 3. § 17 *Non debet ea mulier, cui uir bonorum suorum usumfructum legauit, cellis uinariis et oleariis plenis relictis, putare id ad se pertinere; usus enim, non abusus, legatus est*; D. VII. 5. l 5. § 1 *rerum quae in abusu consistunt* (i.e. money, corn, wine, &c.)=*quae in assumptione sunt* (ib.); ib. § 2; VII. 8. l 12. § 1; XII. 2. l 11. § 2; Ulp. *Fr.* 24. § 27. The Greek words ἀποχρῆσθαι, καταχρῆσθαι have similar double meanings.

**condicionem**] ‘position’, i.e. ‘qualifications’. Cf. D. XXII. 5. l 3. pr. *In persona testium exploranda erunt in primis condicio cuiusque, utrum quis decurio an plebeius sit, et an honestae et inculpatae uitae, an uero notatus quis et reprehensibilis, an locuples uel egens sit, &c.*; XLVII. 21. l 2; &c.

**librarium**] ‘a copyist’. Cf. Cic. *Agr.* II. 5 fin. *Concurrunt iussu*

*neo plures uno tempore librarii: descriptam ad me legem adferunt; D. xxxviii. 1. 1 49 Ueluti si librarius sit, et alii patrono librorum scribendorum operas edat; ib. 1 7. § 5.*

**rus mittat**, &c.] 'send him to the country (i.e. to farm work) and make him carry a basket and lime'. Cf. Hor. Sat. II. 7. 118 *Ocius hinc te ni rapis, accedes opera agro nona Sabino*; Sen. Ir. III. 29 *Si rusticum laborem recusat aut non fortiter obit, a seruitute urbana et feriata translatus ad durum opus*; D. xxviii. 5. 1 35. § 3. On the contrast between the work and habits of slaves in town and country see Colum. I. praef. § 12; ib. 8. §§ 1—4; Plaut. Most. Act I. Sc. 1. And compare the analogous differences between freedmen's services, D. xxxviii. 1. 1 16. § 1 *Tales patrono operae dantur, quales ex aetate, dignitate, ualetudine, necessitate proposito, ceterisque eius generis in utraque persona aestimari debent*; 1 50. pr. *Operarum editionem pendere ex existimatione edentis: nam dignitati, facultatibus, consuetudini, artificio eius conuenientes edendas.*

**qualum**] Among the articles *fructus cogendi gratia* are mentioned *quali uindemiatori exceptori in quibus uuae comportantur* (D. xxxiii. 7. 1. 8. pr.). Cf. Verg. G. II. 241 *Tu spisso uimine qualos colaque prelorum fumosis deripe tectis*; Colum. VIII. 3. § 5; IX. 15. § 12. They appear to have been wicker baskets of a conical shape, used for collecting grapes, honeycombs, &c.

**calcem**] 'lime' used to make mortar. Vitruv. II. 5.

**histrionem—latrinis**] 'if he make a pantomimic actor into a bathman, a member of a chorus of singers into a steward, or put an athlete to clean the privies'.

**histrionem**] A word with Etruscan root and Latin termination. Cf. Liv. VII. 2. § 6 *Uernaculis artificibus, quia 'ister' Tusco uerbo ludio uocabatur, nomen 'histrionibus' inditum*, the first players or rather stage-dancers having come from Etruria and been imitated by the Romans. D. xxxviii. 1. 1 7. § 5 *Impubis quoque est ministerium, si forte uel librarius uel nomenclator uel calculator sit uel histrio uel alterius uoluptatis artifex*. On the change involved in such an alteration of duties, see VII. 4. 1 12. § 1 *Proinde et si histrionis reliquerit usumfructum, et eum ad aliud ministerium transtulerit, extinctum esse usumfructum dicendum erit*. The word was applied in the imperial times especially to pantomimic actors, i.e. actors who represented by dancing and gesticulation a dramatic situation, described in a lyrical poem, sung by a choir. (See Friedländer, *Sittengeschichte*, II. p. 420 sqq.: also in Marquardt, *Staatsverw.* III. p. 529.)

**balneatorem**] Mommsen gives, without noting any various reading, *balniatorem*, a spelling which I do not find elsewhere either in the Digest or other books. It is no doubt a specimen of the wrong spelling which occurred popularly in many words. See Brambach, *Lat. Orthogr.* p. 133 sqq. See below note on I 15. § 6 *doleis* (p. 122), and above I 13. § 8 *balineum* (p. 114).

**de symphonia**] This word appears to be used both of the music and of



the performers, much as 'chorus' is with us. For the second use, as here, cf. Cic. *Verr.* III. 44. § 105 *Cum in eius conuiuio symphonia caneret, maximisque poculis ministraretur.* Such a chorus often accompanied a banquet.

The expression *de symph.* &c. seems to be short for 'withdraw from a chorus and make him a steward'. Cf. *de palaestra*, and *Lat. Gr.* § 1906.

**atriensis** was the name of a house servant, sometimes single, sometimes more, with lower or higher duties according to the establishment. In Plautus he is represented as receiving and paying money, concluding sales and purchases, and having charge of the provisions (Plaut. *Asin.* 347, 424 sqq.; *Pseud.* 608, 609). In Colum. XII. 3. § 9 the *uillica* amongst other things is charged *insistere atriensibus ut supellectilem exponant et ferramenta deterga nitidentur atque rubigine liberentur*, &c. And this latter function accords best with our passage where only inferior manual labours form a suitable contrast. So D. XXXIII. 7. l 8. § 1 *atrienses* and *scoparii* 'brushers' are classed together. (Cf. Marquardt, *Priv. Alt.* p. 140.)

**de palaestra**] '(taking him) from the wrestling school'. The exercises there are spoken of by Plautus *Bacch.* 428 as wrestling, boxing, running, leaping, and throwing the quoit, the spear, and the ball; Cicero (*Leg.* II. 15. § 38) speaks of the first three only. Gymnastic trainers (*palaestritae*) are mentioned among slaves in Mart. III. 58. 20; VI. 39. 9; Sen. *Ep.* 15. § 3. (Cf. Friedländer, *Sittengesch.* II. p. 445.)

**stercorandis latrinis**] Probably Brenkmann's conjecture (supported by Mommsen) *destercorandis* is right. *Stercorare* is 'to manure' the fields, &c. Comp. Plaut. *Curc.* 580 *tuas magnas minas non pluris facio, quam ancillam meam quae latrinam lauat.* On the *latrinae*, generally situated near the kitchen, see Rich, *Dict. Antiq.* s. v., Becker's *Gallus*, Excurs. I. to Sc. 2 (vol. II. p. 279, ed. Göl.).

**abuti uidebitur proprietate**] 'he will seem (i.e. be held by the arbitrator) to be using up and destroying the ownership'. *Abuti proprietate* is a somewhat peculiar expression here. It does not mean 'to misuse the ownership' for he has not the right to use the ownership at all, but to encroach on the rights of the owner and render them valueless by such a use or misuse of the slave. (In D. XXXVIII. 1. l 9. § 1 *proprietas* is apparently used for 'peculiar character'. *Officiales operae nec cuiquam alii debere possunt quam patrono, cum proprietate earum et in edentis persona et in eius cui eduntur consistit (constitit F).* But this meaning can hardly be intended here, where *proprietas* is used by itself, and in a work where it is constantly used for 'ownership'.)

§ 2. **secundum ordinem et dign.**] 'according to the rank and worth of the slave', *ordo* referring to the position of the slave, which might be anything from the manager of large estates to the lowest menial; *dignitas* to the personal qualifications and conduct. See note above on § 1 *rus mittat* (p. 118).

§ 3. **generaliter**] 'generally', i.e. not in the case of slaves only, but of the whole class of moveables. So in Gai. III. 195; D. XII. 6. l 65. pr.; &c.

**modum tenere]** ‘observe due moderation’, ‘keep within bounds’. On *modus* see above on 1 9. fin. (p. 78). Cf. Hor. *Sat.* II. 3. 236 *Quae res nec modum habet neque consilium, ratione modoque tractari non uult*, and other passages quoted by Munro (*Criticisms, &c. on Catullus*, p. 225).

**feritate]** ‘savageness’. Chiefly used of wild animals: but of men in Cod. Theod. VII. 16. 1 3; v. 5. 1 2.

**corrumpat]** see on 1 13. § 2 (p. 104).

**alioquin—conueniri]** ‘otherwise’, i.e. if he do not use proper restraint, he is (i.e. can be) sued under Aquilius’ act. For *alioquin* ‘if it were not so’, cf. Gai. III. 160; D. VIII. 3. 1 23. pr.; &c.

For *lege Aquilia* see on 1 13. § 2 (p. 99).

**conuenire** ‘to sue’ is frequent, e.g. D. III. 5. 1 3. § 1 *Nam et mulieres negotiorum gestorum agere posse et conueniri non dubitatur*; ib. 1 31. pr. *Ob eas res iudicio mandati frustra conuenietur, et ipse debitorem frustra conueniet*: also with the cause of the suit, not the person, for object, e.g. *dolus malus conuenietur* (D. XI. 6. 1 1. § 1). The meaning is developed from the ordinary classical use of *conuenire*, ‘to meet’, ‘visit’.

§ 4: **et si uestimentorum]** This is the fourth species of usufruct considered: A legacy of *uestis* or *uestimenta* included all articles of dress, couch-coverings, carpets and cushions, whether of wool, linen, silk, cotton, or skin, *Uestimentorum sunt omnia lanca lineaque uel serica uel bombycina, quae induendi praecingendi amictiendi insternendi iniciendi incubandique causa parata sunt* (cf. D. XXXIV. 2. 1 22—1 25. § 9).

**non sic ut quantitatis, &c.]** i.e. the usufruct discussed is the usufruct of certain dresses, not the usufruct of such and so many dresses. The first is a usufruct proper: the second a quasi-usufruct, recognised by a senate’s decree and forming the subject of the fifth title of this book. In the first case the property in the dress or other articles did not pass to the usufructuary, and he must therefore exercise his right of using so as not to destroy the substance (above 1 1, but cf. D. VII. 9. 1 9. § 3). In the second case he became the owner, and might destroy or use as he pleased, subject to the obligation, secured by a bond, to replace the goods or their value at the expiration of the usufruct (D. VII. 5. 1 2. pr.; 1 7). The Institutes II. 4. § 2 give *uestimenta* among instances of things for a quasi-usufruct. Jhering (*Gesam. Aufsätze*, II. p. 445 sq.) contests the correctness of the above view: *contra* Windscheid, *Pand.* § 140, n. 2.

**ita uti debere, ne abutatur]** ‘he should use them in such a way as to guard against wearing them out’. See above on § 1 *abuti* (p. 117). So Steph. clearly takes it, comparing it with the use of money. For *ita...ne* cf. *Lat. Gr.* § 1650.

**ne tamen locaturum]** ‘the usufructuary will not however let them out for hire’. The nature of the article was the criterion whether a usufructuary could hire it out. Ordinary dresses are for wearing or using, not for hiring: stage dresses are obviously intended to be worn by many people, and hiring is therefore compatible with a proper exercise of usufruct.

**uir bonus**] i.e. a man desirous of exercising his right with due moderation and discretion. See above on l 9. pr. (pp. 67, 68).

§ 5. **scaenicae uestis...uel aulaei, &c.**] The singular is used collectively, as often in D. XXXIII. 2. See note on l 9. § 7, *palo* (p. 76). 'Stage dress or curtains, or other properties'.

**et puto locaturum, &c.**] The usufructuary will be entitled to let them out for hire, if a usufruct of such things be left him, generally: and further even though the testator only lent them and did not hire them, still the fructuary will be allowed to hire them out. Stage dress is evidently rarely of use to most persons, unless they can hire it out, and the difference between *usus* and *usufructus* would come almost to nothing, if he could not take the 'produce' by letting them for hire.

**commodare**] 'to lend' a thing. It is opposed to *mutuum dare*, because the thing itself, not its equivalent, is to be returned (*mutuum damus, non eandem speciem quam dedimus—alioquin commodatum erit aut depositum—sed idem genus* D. XII. 1. l 2. pr.) and opposed to *locare*, because that is to grant the use of a thing for money, *commodare* is gratuitous (Just. III. 14. § 2. fin.). According to Labeo it was applicable only to moveables, but this view was not accepted (D. XIII. 6. l 1. § 1). See above on l 12. § 2, *precario* (p. 84).

**ipsum fruct.**] The force of *ipsum* is at first sight difficult to see. But *testator ipse* would not have surprised one; 'the testator himself' i.e. as opposed to his successor the fructuary. So *ipsum fruct.* is the fructuary himself as opposed to his predecessor the testator.

**funebrem uestem**] i.e. the robes and couch coverings required for the bier and train of mourners. Such things were probably often kept ready by undertakers and let out for the occasion. Black dress was mourning, though (Plut. *Quaest. Rom.* 26) in the imperial time women wore white (Marquardt, *Priv. Alt.* p. 346). Cf. Paul. *Sent.* I. 21. § 14 *Qui luget, abstinere debet a conviviis, ornamentis, purpura, et alba ueste.*

§ 6. **ita utentem, ne, &c.**] This expression is ambiguous. (1) Stephanus takes *eius* as the proprietor. 'The proprietor must not hinder the fructuary in his use, if it be so guarded as not to put the proprietor in a worse position'. With this use of *ita* qualified by *ne...faciat* compare *ita...ne abutatur* in § 4. (2) The German translator makes *eius* refer to the thing used. (3) Another mode would be to take *eius* of the fructuary and make the proprietor subject to *faciat*. Then *ita* would refer to the kind of use previously described by Ulpian as the proper one for the fructuary. 'The proprietor must not hinder the fructuary in such a use, lest by so hindering he put the fructuary in a worse position'. At the end of this law, taken with l 16, and in l 17. § 1 we have *ne deterior condicio fiat* expressly referred to the fructuary, and apparently presuming it to have been already stated. I am consequently inclined to this third view and to regard § 6 as commencing a new division of the subject by laying down a general rule for the proprietor corresponding to the general rule laid down for the fructuary



in l 13. § 4 *Fructuarius causam proprietatis deteriore facere non debet, meliorem facere potest.* Then Ulpian proceeds to deal with doubts which have been raised on special points.

**id faciat]** i.e. hinder the fructuary.

**doleis]** supply *si eum uti prohibeat.* This spelling is found in two rustic calendars on sundials, *dolea picantur*, *Corp. I. L.* i. p. 359; in the best mss. of Florus II. 8. § 13 (= III. 20), and of *Aetna* 267 (see Munro ad loc.), and in Nipsus, *Grom.* p. 296 ed. Lachm. It is disapproved by Charisius (i. pp. 70, 71 Keil), by Beda (VII. pp. 263, 270 Keil), and by Albinus (ib. p. 295); and approved by Probus App. (iv. p. 198 Keil). In other parts of the Digest we have *dolia*, e.g. XXXIII. 6. l 3; l 6; 7. l 8; l 21; l 26 &c.: but in XXXIII. 6. l 15 the first hand of the Florentine ms. spells it with an *e*. So *labea* is found in Plaut. *Stich.* 721; Cato *R. R.* 20. § 2 and other places for later *labia* or *labrum*. The reverse change of *i* for a more usual *e* is found in *casuaria* D. VIII. 5. l 8. § 5 from *caseus*; and *balniatorem* above § 1.

**dolia, seriae, cadi** and **amphorae** ('tuns, butts, firkins and jars') were all earthenware vessels. *Dolia* were large and used for storing wine, oil, corn, &c.: they were sometimes big enough to hold a man; some vessels of this kind have been found large enough to contain 20, 30 or 36 *amphorae*. *Seriae* are often mentioned along with *dolia*, as used for the same purpose (Colum. XII. 28. § 3; Ter. *Haut.* 460). They were apparently smaller. A *cadus*, when used as a measure, contained  $1\frac{1}{2}$  *amphorae*. An *amphora* as a measure was equal to nearly 6 gallons. It was a two-handed jar usually small or tapering towards the foot. A **cuppa** was a wooden barrel, often mentioned with *dolia* (Marquardt, *Priv. Alt.* p. 627 sq.; Becker's *Gallus* ed. Göll. III. p. 418 sqq.).

**etsi defossa sint]** The *dolia* were often half buried in earth or sand in the wine-cellar. D. XXXIII. 6. l 3 *In doliis non puto uerum, ut uino legato et dolia debeantur, maxime si depressa in cella uinaria fuerint aut ea sunt quae per magnitudinem difficile mouentur: in cuppis autem siue cuppulis puto admittendum, et ea deberi nisi pari modo immobiles in agro, uelut instrumentum agri, erant; ib. 7. l 8 In instrumento fundi ea esse, quae fructus quaerendi cogendi conseruandi gratia parata sunt: ...conseruandi, quasi dolia, licet defossa non sint, et cuppae.*

**cuppis]** Mentioned among things *quae exportandorum fructuum causa parantur* D. XXXIII. 7. l 12. § 1. The usual spelling is *cupa* Cic. *Pis.* 27 fin.; Cato *R. R.* 21; Plin. *N. H.* 23. § 63; Petron. 60; D. XIX. 2. l 31; but cf. D. XXXII. l 93. § 4.

**cadis et amphoris]** Cf. D. XXXIII. 6. l 15 *Unum in amphoras et cados hac mente diffundimus, ut in his sit, donec usus causa probetur (prometur Cujacius): et scilicet id uendimus cum his amphoris et cadis: in dolia autem alia mente coicimus, scilicet ut ex his postea uel in amphoras et cados diffundamus uel sine ipsis doliis ueneat.*

**idem et in spec.]** sc. *putant.* 'The same is held to apply in the case of *specularia*'.

**specularibus]** ‘window panes’, in earlier times made of talc (*lapis specularis*), but later, at least in some cases, made of glass. Glass is found at Pompeii and Herculaneum in several houses and also at other places. Both were denoted by *specularia*. Sen. *Ep.* 95. § 25 *Quaedam nostra demum prodisse memoria scimus, ut speculariorum usum perluciente testa clarum transmittentium lumen*; comp. Lactant. *de opificio dei* 8. 11 *Et manifestius est mentem esse quae per oculos ea quae sunt opposita transpiciat, quasi per fenestras perluciente vitro aut speculari lapide obductas*. Also used for forcing plants, Col. xi. 3. § 52; Plin. xix. § 64 (Marquardt, *Priv. Alt.* p. 735 sq.; Becker’s *Gallus* ed. Göll. ii. p. 315). In D. xxxiii. 7. 1 12. § 16; § 25 it is held that *specularia* are to be regarded as part of the house itself, if they are fixed; part of the *instrumentum domus* if they are loose, but kept to repair breakages. Cf. Paul. *Sent.* iii. 6. § 56.

**sed ego puto, &c.]** There were two principal questions in such legacies. (1) What is included under *fundus* (or under *domus*)? (2) What is included under *instrumentum fundi* (or *instrumentum domus*)? It was common to specify in a will *fundum* &c. *cum instrumento*, or *fundum* &c. *et instrumentum*, and these were two legacies, the *fundus* &c. being one, the *instrumentum* being another. Further *fundus* &c. *instructus* was held to include rather more than these (D. xxxiii. 7. 1 12. § 27 sqq. but cf. 15). In the case of a bequest of a usufruct Ulpian holds that the *instrumentum* is included under the mere word *fundus* or *domus*. This was doubtless because the estates or house could not well be used nor the produce taken without the *instrumentum*. It was otherwise in the case of the bequest of (the property in) a house or estate. There *fundus* or *domus* did not carry with it the *instrumentum* (D. xxxiii. 10. 1 14), except so far as permanent fixtures were concerned. *Cum fundus sine instrumento* (without naming the stock) *legatus sit, dolia, molae oliariae, et praelum, et quaeque infixa inaedificataque sunt, fundo legato continentur, nulla autem ex his rebus quae moveri possunt, paucis exceptis, fundi appellatione continentur* (ib. 7. 121)<sup>1</sup>. Possibly it was on this analogy that some denied the fructuary the right of using the barrels and jars, &c. On a sale of an estate, reserving the *fructus*, it was held that the *dolia* passed to the purchaser (D. xviii. 1. 1 40. § 5).

**nisi sit contraria uoluntas]** ‘unless the intention be opposed to it’, i.e. the intention of the testator in this case, in other modes of constituting a usufruct the intention of the contracting parties. For *uoluntas* cf. D. xxxii. 1 50. § 4; § 6; Paul. *Sent.* iii. 6. § 71; &c.

§ 7. The (bare) proprietor cannot impose a servitude on the estate of which the usufruct is in another, nor can he lose an existing servitude. Both acts would deteriorate the position of the usufructuary. But he can acquire a servitude. That is for the permanent improvement of the estate, and the usufructuary cannot prevent him, even if he wished. The usufruc-

<sup>1</sup> Paulus iii. 6. § 34 is irreconcilable with this doctrine. See the editors. D. xxxii. 1 93. § 4 is perhaps only apparently discordant with xxxiii. 7. 1 4.

tuary cannot acquire a servitude for the estate, but he can retain one; and if one be lost by non-user on the part of the fructuary, the fructuary is liable, just as he would be, if he failed in any other way to uphold the property. As to the imposition of a servitude he has no power whatever: his consent even is of no avail to enable the proprietor to impose one—unless indeed it be a servitude which does not make the usufructuary's position worse.

Similarly the heir before constituting the usufruct cannot burden the estate by imposing servitudes or releasing servitudes, nor can he commit waste by cutting down trees or pulling down buildings, &c. (D. VII. 6. l 2).

**imponere]** regularly used of an owner subjecting his estate or house to a servitude in favour of a neighbouring one, e.g. D. VII. 6. l 2; VIII. 1. l 2; 2. l 17; 3. l 6; &c.

**amittere servitutem]** Loss of a predial servitude could occur only (a) by non-use for the statutable time (see note on l. 5; Cod. III. 34. l 13); (b) by destruction (without subsequent restoration) of the dominant estate, e.g. a house (D. VIII. 2. l 20. § 2); (c) by confusion, i.e. by the owner of one acquiring the property in the other estate (D. VIII. 6 l. 1). For (b) and (c) the fructuary would have his remedy against the owner by vindication (D. VII. 6. l 1. pr.; XLIII. 25. § 4): for (b) also under the *lex Aquilia*, cf. IX. 2. l 12; and the interdict *quod vi* XLIII. 24. l 12. pr. As to (a) the duty of retention falls on the usufructuary; cf. D. VIII. 6. l 20; l 21.

The case of giving up a servitude is not included under *amittere*. The proper term for that is *remittere* (D. VIII. 1. l 6; l 14. § 1).

**adquirere...etiam invito fruct.]** It does not appear in what way such an acquisition could impair the position of the usufructuary, and hence his unwillingness is disregarded. Whether he would be liable, if he lost such a newly acquired servitude, is not said.

**quibus consequenter]** 'in accordance with which'. The logic is, that, if the fructuary has no power to veto an acquisition, he has no power of himself to acquire one. The fact is the fructuary has no power permanently to alter the condition of the estate in any substantial manner.

**retinere—tenebitur]** The usufructuary being in *de facto* possession has the power, and from his general obligation to maintain the property he has the duty, of retaining rights belonging to the estate. Cf. l 12. § 2; § 3; 9. l 1. § 7; IX. 6. l 20. The fructuary can proceed against withholders of servitudes by claiming (*vindicansdo*) his usufruct against them. *Iulianus scribit hanc actionem aduersus quemuis possessorem ei* (i.e. usufructuario) *competere: nam et si fundo fructuario servitus debeat, fructuarius non servitutem* (only the owner could do that D. VIII. 5. l 2. § 1) *sed usumfructum vindicare debet aduersus vicini fundi dominum*; cf. D. XLIII. 25. § 4.

**proprietas dominus ne quidem, &c.]** This doctrine has seemed so strange to many writers that they have made all kinds of attempts to alter the passage or construe it otherwise than in its natural sense. See Glück, *Pand.* IX. p. 42 sqq. Modern writers have accepted the natural interpreta-



tion, but differed as to the mode of explaining the origin of the doctrine. Vangerow (*Pand.* § 338 n. 2. § 3) explains it as a refined consequence of the principle *servitus servitutis non datur* (D. XXXIII. 2. 1 l. pr.). Others, from slightly different points of view, derive it from the fact that a usufructuary could not transfer his usufruct (see above note on l 12. § 2 p. 81), and therefore could not do what was in effect transferring part of the rights belonging to the usufruct; Keller (*Civil-Prozess* § 24 fin.) laying stress on the fructuary having no place in a formal surrender in court; Zachariae (*Z. G. R.* xiv. p. 133) suggesting that a formally established usufruct could only be impaired by a formal act, not by a mere consent (so Noodt l. cap. 15); but that, after the time when servitudes could be established by agreement, this rule became antiquated, and was taken into the Digest by mistake: Böcking (*Pand.* § 162 c. = II. p. 224) deducing this rule from the essential attachment of the usufruct to the person of the usufructuary. Similarly Arndts (*Pand.* § 179 n. 5, followed by Windscheid, *Pand.* § 203 n. 18) says "The *in iure cessio* of the owner alone could not establish a servitude: the *in iure cessio* of the usufructuary *qua nihil agitur* (cf. Gai. II. 30) could not remove the defect, any more than his informal consent could, and still less was an *in iure cessio* by both together conceivable", and adds that it is practically of no importance, mere agreement being now able to establish and put an end to servitudes, and, if strict form were insisted on, all that would be necessary would be for the usufructuary to surrender his usufruct and then after the establishment of the desired servitude receive it back again. The passage of Paulus which forms l 16 Arndts regards as unsuitably interpolated. Kuntze (*Excurs.* to § 541, p. 501) objects (1) that this explanation from the old *in iure cessio* only applies to formally constituted usufructs and yet there were many others, and (2) that it does not shew any ground which would not equally apply to innocent servitudes which yet were allowed (l 16). He holds that the value of the usufruct could not be reduced, for that would imply a partial alienation which was not allowed to a usufructuary: hence only such servitudes could be created which did not affect the value of the usufruct: these however could be constituted by the proprietor without the consent of the usufructuary. My own view would rather be expressed thus: there is no question here of the practical exercise of a servitude by agreement between the parties concerned, whether it be a positive or negative servitude, whether the usufructuary as a matter of fact allows his neighbour a right of road through his fields or refrains from blocking up his neighbour's lights. The question is, can a servitude be legally and permanently imposed on an estate, subject to a usufruct, by the owner, or by owner and fructuary combined? Now a servitude can only be created in strict law *in praesenti* (D. VIII. 1. 1 4. pr.). The owner cannot do it *in praesenti*, for he cannot impair the position of the fructuary. The fructuary has a right to use and take produce; but he has no right of alienating the property or changing it in permanence. Consequently he cannot supply the defect

of power. (Comp. F. Schöman's view in Glück, p. 58.) While the usufruct lasts, the estate may be slightly modified or improved, but may not be deteriorated either by owner or fructuary. This being Ulpian's view, Paulus qualifies it only by suggesting that there may be servitudes which from their own nature may be imposed without impairing the thing for the fructuary, e.g. that he should not raise his house higher: for this is just what the fructuary is actually prevented from doing by the law of his position (l 13. § 7). It is possible enough that the stiff forms of the early modes of conveyance may have contributed to give this stiff unalterable character to a usufruct, but Ulpian's doctrine seems to be a deduction from the two rules that the proprietor may not impair the position of the fructuary, and that the fructuary is not to alter the character and position of the thing used. In l 13. § 5 no allusion is made to the possibility of consent. The discussion is directed to the right only.

**ne quidem consentiente]** This order (*ne quidem* coming together) is found above l 12. § 4; below l 25. § 5, and in Gai. I. 104; III. 93; Ulp. 23. § 11; § 13; D. xxxv. 1. l 15. § 2; XL. 5. l 53. fin.; XLI. 1. l 11; XLII. 3. l 4. § 1; 8. l 18; XLVI. 2. l 14. § 1; XLVIII. 10. l 7. The passages from Cicero and Livy quoted in Forcellini as supposed by some to contain instances, as he says, do not stand the test of good mss., though there is some ms. authority for this order in Cic. *Caecin.* 13. § 37 (see Keller). The usual order *ne...quidem*, with the emphatic word interpolated, occurs in D. XII. 6. l 67. § 4; xxxi. l 11. pr.; XI. 4. l 55. pr.; I. 16. l 40. § 3; &c.

**l. 16. uicino concesserit]** A praedial servitude must belong to an estate, and that estate must be a neighbouring estate; D. VIII. 5. l 2. § 1 *Seruitutem nemo (alius) vindicare potest, quam is qui dominium in fundo uicino habet, cui seruitutem dicit deberi* (cf. ib. l 38). It is not necessary, that the estates or houses, one of which serves the other, should be next to one another (ib. l 3).

For *concesserit* see note on l 12. § 2 (p. 81).

**ius sibi non esse altius tollere]** This servitude, viz. that a neighbouring house should not be raised, may be created in favour of any house. See D. VIII. 2. l 4; l 6; l 12, &c. Such raising might affect the dominant house by obstructing light, by obstructing prospect and by preventing the drip from the dominant house being received by the servient (cf. ib. l 20. § 5; l 21). A house, not servient to another, could be raised even though it thereby darkened the neighbouring houses (ib. l 9).

**l. 17. locum religiosum facere]** Gai. II. § 4 sqq. *Sacrae res sunt quae diis superis consecratae sunt: religiosas quae diis manibus relictæ sunt. Sed sacrum quidem hoc solum existimatur, quod ex auctoritate populi Romani consecratum est, ueluti lege de ea re lata aut senatus consulto facto. Religiosum uero nostra uoluntate facimus, mortuum inferentes in locum nostrum, si modo eius mortui funus ad nos pertineat.* Marcian, D. I. 8. l 6. § 4, adds *Sed et in alienum locum concedente domino licet inferre: et licet postea ratum habuerit quam illatus est mortuus, religiosus locus fit.* Ground that

was neither sacred, nor religious, nor hallowed (*sanctum*, e.g. city walls and gates), was called pure (D. XI. 7. 12. § 4), i.e. not subject to restrictions on its use. (Compare the application of this term to unconditional legacies and stipulations, e.g. D. L. 16. 1 10; xxx. 1 91. § 1; &c.)

Even to the *Manes* a man could not give what was not in his own disposal. Hence the burial of a person did not make the spot religious, if a usufructuary (D. XI. 7. 12. § 7), or one who had an easement in the place which would be interfered with by the grave (ib. § 8), or a joint owner (ib. 1 41; x. 3. 1 6. § 6) dissented. A usufructuary however could not validly object to the testator being buried in the ground subjected by him to the usufruct, if there was no other equally convenient place (XI. 7. 12. § 7; cf. xxx. 1 53. § 7). If an heir had not entered on the inheritance, still either he or any one could by burying the deceased in his (the deceased's) own ground make it religious (ib. 1 4). One who without right placed a corpse in pure ground was bound by an action on the case either to remove the corpse, or to purchase the ground affected (ib. 17). This action might be brought by the owner or usufructuary or easement-holder (ib. 1 8. § 4). Even the owner of the ground could not dig up the body and remove it without the consent of the Priests (*pontifices*) or the Emperor. If he did, he was liable to an action for insult (*iniuriarum* 1 8. pr.). See also D. XLVII. 12. 1 3. § 4. Mere temporary deposit of a corpse did not make the place religious (1 40). The religious character extended only to the grave itself, not to land destined for graves (1 2. § 5); and graves of enemies were not *religiosa* to the Romans (D. XLVII. 12. 1 4). Religious places could not be sold (Paul. *Sent.* I. 21. § 7; Cod. III. 44. 1 2; 1 9; cf. D. XI. 7. 1 8. § 1; 1 10).

Gaius' words, quoted above, *si modo eius mortui funus ad nos pertineat* are not adopted by Justinian, nor is (so far as I see) the condition found in the Digest. The persons to whom the *funus* belongs are (1) the person named by the testator, (2) the named heir, (3) in default of such, *legitimi uel cognati* in their proper order of succession (ib. 1 12. § 4).

On family tombs and the right to be buried in them, see D. XI. 7. 1 5; 1 6; XLVII. 12. 1 3. § 3; Cod. III. 44. 1 4; &c., and Bruns, *Fontes*, Pt. II. § 13.

**fauore religionis]** Deviation from strict rule is often spoken of in favour of liberty, e.g. D. XXIX. 2. 1 71. pr. *quod libertatis fauore introductum est*; XXVIII. 4. 1 2. fin., XL. 5. 1 24. § 10 *Nec enim ignotum est quod multa contra iuris rigorem pro libertate sint constituta*; ib. 7. 1 20. § 3; Paul. *Sent.* II. 24. § 2; &c.; in favour of dowries, XXIII. 3. 1 9. § 1 *Sed benignius est fauore dotium, necessitatem imponi heredi consentire ei quod defunctus fecit*; in favour of marriage, XXIV. 3. 1 45. A leaning towards personal or equitable considerations is often denoted by *benignius receptum est* (XXI. 2. 1 56. § 7); *benigna uoluntatis interpretatione* (XXXIV. 1. 1 20. § 1); *propter utilitatem benignior iuris interpretatio facta est* (Gai. III. § 109); &c. See also Böcking, *Pand.* § 117.



**finge enim**] 'for suppose'. So often, e.g. D. vi. 1. l 38 (three times); xi. 7. l 4; xvii. 1. l 54. pr.; xxxvi. 1. l 13. § 3.

**testatorem inferre**] 'that he bury the testator', i.e. in the ground under usufruct. The same doctrine is laid down in D. xi. 7. l 2. § 7; and as regards a legatee ib. l 4; xxx. l 53. § 7. The burial of the testator is regarded as having a prior claim on the land to the usufructuary or to the legatee, just as the expense of the funeral was to be discharged out of the legacies if there was no other source (ib. l 14. § 1).

**inferre** is the regular expression for bearing to a place for burial. Cf. Nep. *Paus. fin.*; Suet. *Cal.* 15, &c.; D. xi. 7 passim.

**cum non esset, &c.**] 'there being no (other) place where he could be so conveniently buried'.

**oportune**] So spelt in D. xi. 7. l 2. § 7; 14; xxx. l 53. § 7; *oportunitas* iv. 3. l 33; xi. 7. l 12. pr.; *oportunus* vii. 1. l 41. pr.; i. 15. l 3. pr.; xviii. 2. l 4. § 6. But *opportuni* Gai. ii. 97; *opportunitas* D. xii. 6. l 26. § 12; xxxviii. 5. l 1. § 15. In Plautus the mss. give *oportunitas* *Curc.* 305; *Men.* 137; *Merc.* 964, and *o* in *Epid.* 203 (these are all the Plautine passages); *oportunus* Ter. *Andr.* 345; *Eun.* 1077 in all mss.; *Adelph.* 81; 267 in most (but not Bemb.); "the word occurs five times in Lucretius: in each case either both A B or one or the other write *oportunus*" (Munro on iii. 545); *oportunus* Caes. *B. G.* iii. 15. § 5; *oportunitas* ib. 17. § 7 (*opport.* Holder's B); *oportunitas*, Sall. *Jug.* 6 (in all mss.?). In Cicero the mss. are divided. See Müller (who always writes *oportun.*) on *Rosc. Am.* 24. § 68; *Lael.* 6; Mayor, *Nat. D.* Vol. i. p. 52.

§ 1. **ex eo, ne, &c.**] 'in consequence of the rule that the proprietor must not impair the position of the fructuary, the question is often asked, whether an owner can correct his slave', i.e. a slave of which another has the usufruct.

**coercere**] Often 'to keep down, punish', e.g. Cic. *Or.* iii. 1. § 4 *Pignori-bus ablati* Crassum instituit *coercere*; *Off.* iii. 5. § 23 *Ciuium coniunctionem qui dirimunt, eos morte, exilio, uinculis, damno coercent*; *Legg.* iii. 3. § 6; Cels. iii. 18 ad fin. *Insaniens ubi perperam aliquid dixit aut fecit, fume, uinculis, plagis coerendus est*; D. ii. 4. l 2 *Qui et coercere aliquem possunt et iubere in carcerem duci*; xxiii. 4. l 5. pr.; xxvi. 7. l 49; xlviii. 19. l 28. pr. *Proxima morti poena metalli coercitio*; Coll. xiv. 3 *Sufficit eos uerberibus coerceri*.

**plenissimam coercionem**] 'fullest power of punishment'. The ordinary right of an owner to punish a slave was not affected by another's having the usufruct of the slave, provided the punishment was inflicted without malice. The power over a slave was legally unlimited in the Republican period, and with some exceptions even till the Antonines. Cato major had a regular flogging time, viz., directly after meals, and had slaves put to death after a trial before the household (Plut. *Cat. mai.* 21). Horace (*Sat.* i. 3. 119) speaks of three instruments of beating, a rod (*ferula*, for which Plautus has *uirgae*), a leathern thong (*seutica* or *lorum*

or *habena*), and a whip of knotted ropes (*flagrum*, *flagellum*), or of wire with prickles (perhaps what Plautus meant by *stimuli*). Blows with the hand were common. Fetters for the hands feet and neck, often combined with work in a mill (*pistrinum*, or *ergastulum*), or stone quarries, are often mentioned in Plautus. See also Colum. i. 6. § 3; 8. § 16; Plaut. *Asin.* 549 sqq. with Lorenz on Plaut. *Pseud.* Praef. p. 52. Galen quoted by Marquardt speaks of runaway slaves having their legs cut off (cf. Cod. vi. 1. 13), thieves their hands, babblers their tongue (cf. Cic. *Clu.* 66. § 187). Runaways were often branded. Tortures of various kinds, and death by crucifixion, by fire, by exposure to wild beasts, are all spoken of. *Eculei et fidiculae et ergastula et cruces et circumdati defossis corporibus ignes et cadauera quoque trahens uncus, uaria uinculorum genera, uaria poenarum, lacerationes membrorum, inscriptiones frontis, et bestiarum inmanium caueae* (Sen. *Ir.* iii. 3. § 6). *Cum in seruum omnia liceant, est aliquid quod in hominem licere commune ius animantium uetet* (Sen. *Clem.* i. 18). See generally Marquardt, *Priv. Alt.* pp. 175—184.

A *lex Petronia* (of uncertain age) and various senate's decrees forbade a master without official authority to give up a slave to fight wild beasts (D. XLVIII. 8. 1 11. § 2). Claudius declared free all slaves abandoned as diseased (D. XL. 8. 1 2; Cod. VII. 6. § 3). See Suet. *Claud.* 25; Dion Cass. LX. 29, who speaks also of masters being forbidden to kill their slaves. Hadrian is said by Spartianus (*Hadr.* 18) to have forbidden it. A SC. about 83 A.D. forbade the castration of slaves, and Hadrian repeated this (D. XLVIII. 8. 1 4. § 2—16). Gaius (I. 53) and Ulpian (D. i. 6. 1 2) name Antoninus (Pius) as having directed the provincial Governors in case of cruelty or outrage to slaves to compel the master to sell them absolutely; and that any one who put his slave to death should be punished just as if the slave had not been his own. The punishment was under Sulla's law (*Lex Cornelia de sicariis*) banishment (*deportatio*) to an island and confiscation of property, but in later times was death, except in the case of persons of rank (D. XLVIII. 8. 1 3. § 5). The law was in general terms 'qui hominem occiderit' with which compare Juvenal vi. 219 'Pone crucem seruo'. *Meruit quo crimine seruus supplicium? O demens ita seruus homo est? nil fecerit, esto: hoc uolo, sic iubeo, sit pro ratione uoluntas.* A law of Constantine's (A.D. 319) given in Cod. Theod. ix. 12. 1 1; C. Just. ix. 14 *de emendatione seruorum* is worth quoting: *Si uirgis aut loris seruum dominus afflixerit aut custodiae causa in uincula coniecerit, dierum distinctione siue interpretatione depulsa multum criminis metum mortuo seruo sustineat. Nec uero immoderate suo iure utatur, sed tunc reus homicidii sit, si uoluntate eum uel ictu fustis aut lapidis occiderit, uel certe telo usus letale uulnus influxerit, aut suspendi laqueo praeceperit, uel iussione taetra praecipitandum esse mandauerit, aut ueneni uirus infuderit uel dilanauerit poenis publicis corpus, ferarum uestigiis latera persecando, uel exurendo admotis ignibus membra aut tabescentes artus, atro sanguine permixta sanie defluentes, prope in ipsis adegerit cruciatibus uitam linquere saeuitia inmanium barbarorum.*

Another law A. D. 326 (Cod. Theod. ib. l 2) exempts from charge masters who in the correction of their slaves have *beaten* them so that they died. Cf. *Collat.* III.; Walter, *Rechtsgeschichte*, §§ 466—469.

Beating a slave did not entitle a fructuary to an action against the bare proprietor nor the proprietor to an action against a fructuary (D. XLVII. 10. l 15. § 37). If a third party beat the slave, the proprietor, rather than the fructuary, has a right of action (ib. § 47).

**sine dolo malo**] i. e. honestly, not maliciously; not creating a ground for punishing the slave in order to annoy or injure the fructuary, but inflicting a punishment *bona fide*. Cf. D. XX. 1. l 27 *Seruum quem quis pignori dederat, ex leuissima offensa uinxit, mox soluit: creditor minoris seruum uendidit*, on which Ulpian remarks *Si ut creditori noceret uinxit, tenebitur: si merentem, non tenebitur*.

**dolus**] 'craft' (not necessarily at first in a bad sense) is with *malus* constantly used both in laws, edicts and formulae, and also with and without *malus* in the ordinary language both of laymen and lawyers. It is used with two shades of meaning according to the opposed thought, viz., (1) 'wrongful', i. e. 'unlawful, intention', which corresponds to Eng. 'malice' as a law term, and is opposed to *casus*, *error*, *ignorantia*, *negligentia*, *culpa*; (2) trickery or fraud in dealings with another, leading to his pecuniary loss, and in this sense is opposed to *bona fides*.

The first sense is especially shewn in the common formula (a) *Sciens dolo malo*. *Lex Agrar.* (C. I. L. I. No. 198) line 10; 21; 61; *Lex Iul. Municip.* C. I. L. 206 (of unqualified senators) *ne quis eum in senatum ire iubeto sc. d. m.* (i. e. *sciens dolo malo*). *Lex Iulia et Pap. Popp.* (cf. D. XXIII. 2. l 44) *ne quis (senator) sponsam uxoremue sciens dolo malo habeto libertinam, &c.* *Sciens* is sometimes omitted without difference of sense, e. g. *lex Cornelia de sicariis* (D. XLVIII. 8. l 1) *Qui hominem occiderit, cuiusue dolo malo incendium factum erit...quiue falsum testimonium dolo malo dixerit quo quis publico iudicio rei capitalis damnaretur*; D. XLVII. 8. l 2; l 4 *passim*.

Similarly (b) the phrase *sine dolo malo* in our text refers to the absence of ill intention (cf. D. XI. 3. l 1); in *Lex Iul. Mun.* 1. 40 (of charging a householder with the expenses of repairing the road) *Ei qui eam uiam tuendam redemerit tantae pecuniae eum eosue attribuito sine d. m.*, it seems to be directed against the official's keeping back money from the contractor. Similarly D. XLII. 5. l 9. § 4; § 5; &c.

(c) One who wrongfully (*dolo* or *dolo malo*) has parted with the possession of a thing, or has prevented himself or another from being able to fulfil a duty, is as liable to the action, as if he were in possession or capable. See e. g. the Praetor's edict D. XLIII. 3. l 1. § 7 *aut dolo desiit possidere*; 2. l 1; 4. l 1. § 1; v. l 1. § 1. Similarly D. XLIII. 24. l 15. § 10 *Eum qui dolo malo fecerit, quo minus possit restituere, perinde habendum ac si posset*; IX. 4. l 21. pr.; § 2; &c.

Three other prominent uses are the following. (d) The *clausula doli*



or *doli mali* (D. XLV. 1. l 22 ; l 53 ; l 119 ; &c.), which gave a character approaching that of a *bonae fidei actio* to an action or a stipulation which contained it (Savigny, *Syst.* v. p. 495). It was in the words *dolum malum abesse afuturumque esse*, or *si huius rei dolus malus non aberit, quanti ea res est dari spondes* (D. XLVI. 7. l 19. Cf. xxxv. 3. l 1. pr. ; VII. 9. l 5. pr. ; Bruns, Pt. II. 1. 2. a ; b ; d).

(e) The *actio de dolo* (D. IV. 3), and (f) the *exceptio doli* (D. XLIV. 4). The *actio de dolo* was introduced by C. Aquilius in the time of Cicero who often mentions it ; e. g. *Off.* III. § 50. Aquilius defined *dolus malus* as *cum esset aliud simulatum aliud actum*. Similarly Servius. Labeo blamed this definition because it made pretence (*simulatio*) necessary to ground the action, and all pretence wrongful. His own definition, approved by Ulpian, is *omnis calliditas fallacia machinatio ad circumveniendum fallendum decipiendum alterum adhibita* (D. IV. 3. l 1. § 2). The action was only granted, where there was no other action applicable. It was *famosa* (ib. § 4).

Cicero argues on the meaning of *dolus malus* in the speech *pro Tullio* 13, 14. Cf. Ulpian D. XLVII. 8. l 2. A large collection of passages is given by M. Voigt, *Bedeutungswechsel*, pp. 45 sqq., 89 sqq. ; and see Pernice *Labeo* II. 60 sqq.

**quamuis**, &c.] Notwithstanding that the fructuary has limits put on his power of dealing with a slave, the proprietor is not so bound. So far the two are not on an equal footing, though the general principle *ne deteriorem condicionem alterius faciat* applies to both.

**nec contrariis**, &c.] ‘the fructuary may not spoil a slave’s trained capacity, by putting him to services which are contrary to his capacity and to which he is not used’. Ulpian evidently refers to what he has said in l 15. § 1 *si librarium rus mittat*, &c.

**contrariis**] Here used in reference to the contrasts set out in l 15. § 1. *Contrarius* is found absolutely in Cod. Th. VII. 1. l 4 *contraria corporis valetudo*, ‘bad state of health’ ; D. XXXVI. 14. l 77 (75) *contraria fortuna*, ‘bad fortune’.

**ministeriis**] ‘services’. Cf. D. XXI. 1. l 65. § 2 ; XL. 9. l 12. § 1 ; &c. *Ministerium* is also used for a slave (= *minister*), D. VII. 8. l 12. § 5 *Si usus ministerii alicui fuerit relictus, ad suum ministerium utatur* (where both meanings are found).

**artificium**] ‘quality as a craftsman’, ‘professional’ or ‘artistic skill’, ‘trained capacity’. Cicero speaks of an *artificium accusatorium* (*Rosc. Am.* 17. § 49), of a lawyer’s *artificium* (*Fam.* VII. 13. § 2), of a doctor’s (*Cluent.* 21. § 57). Cf. Cic. *Fin.* IV. 27. § 76 *prudential omnes, cuicumque artificio praesunt, debent habere*; *Off.* I. 42. § 150 ; D. XXXII. 1. l 65. § 2 *Si unus servus plura artificia sciat, et alii coci legati fuerunt, alii textores, alii lecticarii, ei cedere servum dicendum est, cui legati sunt in quo artificio plerumque uestabatur* (i. e. If cooks are bequeathed to one, weavers to another, sedan-bearers to another, and one slave is trained in all these offices, he

will fall to the legatee who gets the class to which he most generally belonged); XII. 6. l 26. § 12; XL. 4. l 24.

**corruptere]** Cf. l 66 and note on l 13. § 2 *aq. duct. corrupti* (p. 104).

§ 2. **seruum noxae dedere]** (a) If an unemancipated child or a slave (or a tame animal) commits an injury for which, if he were *sui iuris*, he would be liable to an action, the father of the child, or owner of the slave (or animal), is liable either to make compensation for the damage, or to give up the offender to the injured party. The regular phrase used in this second alternative is *noxae dedere, noxae deditio*. In a few places in the Digest (IV. 3. 19. § 4; IX. 4. l 17. § 1; l 22. § 3; l 28; XXX. l 53. § 4; XLII. l 14. § 8; XLIII. 24. l 7. § 1; XLVI. 3. l 69) *dedit, dedisti, dedero, dedisset*, &c., are found instead of *dedidisti, dedidero*, &c., the similarity of the present *dedere* to the perfect (of *dare*), *dedi*, naturally leading to the mistake. (In Liv. XXII. 60. § 7 the best ms. has *dediderint*; inferior MSS. *dederint*.) But the constant use of such forms as *dedere, dedi* (infin.), *deditio, dedendi*, not *dare, dari, datio, dandi*, and the significance of the compound, leave no doubt of the true phrase<sup>1</sup>.

(b) Another mistake is in taking *noxae* as a genitive<sup>2</sup> after *deditio*. This is at the root of Justinian's definition (*Inst.* IV. 8. § 1) *Noxa est corpus quod nocuit, id est seruus* (cf. Ulpian D. IX. 1. l 1. pr. *dari id quod nocuit; id est, id animal*, &c.), and of the expression, if it be not a mere copyist's blunder, *noxae dedendae* (for *noxae dedendi*), found in D. V. 3. l 20. § 5; IX. 1. l 1. § 16; XLII. 1. l 6. § 1 and perhaps elsewhere. A corresponding mistake, probably of the copyists, is *noxam dedere* in the Praetor's edict D. IX. 3. l 1. pr. (but *noxae dedi iubebo* in l 5. § 6), *noxam det* (D. XLIII. 24. l 7. pr. immediately after *noxae dedere* and before *noxae dedisset*), and *noxam dedere* Just. *Inst.* IV. 17. § 1. *Noxae* is an ordinary dative of the indirect object.

(c) *Noxa* is from *nocere*, and means 'harm', 'hurt', originally 'physical harm', but afterwards with a more general application. Harm done may be regarded from two sides, that of the injurer and the injured.

<sup>1</sup> *dare mancipio* is used (Gai. I. 140; IV. 79; cf. Just. IV. 8. § 7 in *noxam dare*) of the actual transfer and may have contributed to the mistake. The mistake is quite current among modern lawyers, and, if authority could make it legitimate, the authority of the following, all of whom, strange to say, occasionally speak of *noxae datio* or *dare*, would be more than ample: Arndts, Baron, Bekker, Bethmann-Hollweg, Böcking, Dirksen, Glück, Huschke, Karlowa, Keller, Krüger and Studemund, Kuntze, Long, Madvig, Mandry, Marezoll, Maynz, Mühlenbruch, Padelletti, Rein, Rudorff, Salkowski, Savigny, Scheurl, Schrader, Sell, Unterholzner, Vering, Voigt, Wächter, Walter, Wening-Ingenheim, Windscheid, Zimmern.

<sup>2</sup> Schrader ad *Inst.* IV. 8. pr. says it is for *noxae* (i. e. *damni*) *causa dedere*. This is not grammatically justifiable unless it be compared with *accusare, teneri, damnare*, &c., *Lat. Gr.* §§ 1324, 1327. But such an ellipsis with a word like *dedere* should only be assumed in the absence of other explanation. *Ob noxam* is the phrase for this notion (see next note). Justinian perhaps took *noxae* as a predicative dative 'as a guilty object', but *dedere* is not otherwise so used, and *noxae* does not mean '*corpus ipsum quod nocuit*'. That *noxae* in this phrase is an indirect object seems to me certain.

In the same way its natural or legal consequence is satisfaction in some shape, either punishment to the injurer, or compensation to the injured. The old phrases appear to have been *noxam nocere*, 'to do harm', *noxam sarcire*, 'to make good the harm'. The first is found in Liv. ix. 10. § 9, where the Fetial surrendering Sp. Postumius to the Samnites says *Quandoque hisce homines iniussu populi Romani Quiritium foedus ictum iri spoponderunt, atque ob eam rem noxam nocuerunt, ob eam rem quo populus Romanus scelere impio sit solutus, hosce homines uobis dedo*; in a passage from Julian in D. ix. 4. 1 2. § 1 *Si seruus furtum faxit noxiamue nocuit* (I assume *noxia* to be due to later writers), for which Pomponius writes *furtum fecit seruus aut noxam nocuit* (D. xxx. 1. 45. Cf. xxxv. 2. 1 63. pr.). For this Gaius has *noxam committere* iv. 77, 78, &c. For the second phrase see Gell. xi. 18. § 8 *Pueros impuberes (furti manifesti prensos) praetoris arbitratu uerberari uoluerunt noxamque ab his factam sarciri*; D. ix. 1. 1 1. § 11, where Q. Mucius is reported as saying that the owner of an animal, which unprovoked had killed another, *aut noxam sarcire aut in noxam dedere oportere* (cf. p. 141 n. and D. xlvii. 9. 1 9 extracted from Gaius' work on XII. Tab.). One way to repair the loss of the injured person was to hand over the offender to him, which was expressed forcibly by *noxae dedere* 'to give him up to the harm'. So far *noxam* denoted only the harm done: but the harm done leaves the doer in fault and liable to make amends. And this other side of the fact is also expressed by *noxam* in some phrases, viz., *noxam solutus* 'free from fault' or 'guilt', or 'liability to make amends'; *noxam caput sequitur* 'the guilt or liability follows the agent'; i. e. the owner of the slave or other guilty party for the time being, though not the owner at the time of the offence, is liable to be called on to surrender him (Paul. Sent. ii. 31. § 7—§ 9).

(d) *Noxam* is much confused with *noxia*. *Noxam* being 'harm', *noxius* would properly be 'harmful', 'guilty' (cf. D. xlvii. 6. 1 1. pr.; Colum. iii. 3. § 8), and *noxia* subst., 'harmfulness', 'guilt'. Accordingly *noxia* in Plautus and Terence, who often use *noxia*, never *noxam*, is 'fault', 'guilt'; e.g. *careo noxia* (Bac. 1005); *manifestum teneo in noxia* (Merc. 731); *Tranioni remitte hanc noxiam*, 'forgive Tranio this fault' (Most. 1169); *Sum extra noxiam* (Ter. Hec. 276); *Pueri inter se quam pro leuibus noxiis iras gerunt* (ib. 310). *Noxam* is in the same sense in Cato R. R. 5. § 1 *Si quis quid deliquerit, pro noxa bono modo uindictet*, and in Caecil. ap. Fest. p. 174 *Ista quidem noxa mulieris est, magis quam uiri*. Cicero has only *noxia*, Rosc. Am. 22. § 62; Leg. iii. 4. § 11; 20. § 46 *noxiae poena par esto, ut in suo uitio quisque plectatur*. Livy has (according to Madvig's text) *noxam* 30 times, *noxia* 8 times, *noxam* generally, and *noxia* sometimes, meaning 'fault', 'crime', 'guilt', e.g. *reus haud dubius eius noxae* (v. 47. § 10); *neque de noxa nostra neque de poena rettulistis* (ix. 8. § 4); *adeo neminem noxae poenitebat ut etiam insontes fecisse uideri uellent* (ii. 54 fin.); though *noxiae* chiefly occurs (as predicative dative) in such phrases as *nihil eam rem noxae futuram* (xxxiv. 19. § 5), where it may be taken as 'harm' and compared with



*damno esse*, instead of with *crimini esse* (cf. D. xvii. 1. 1 48. pr.). In two places (xxxvi. 21. § 3; xli. 23. § 14) *noxa* is used of mere 'harm', e.g. *sine ullius noxa urbis exercitus reductus*. Ovid has *noxa* 'harm' in *Fast.* vi. 130; *Met.* xv. 334; 'fault' in *Met.* i. 214; *Pont.* ii. 9. 71. Manilius has *noxia* in the sense of 'guilt' ii. 602; iv. 94; 418; *noxa* as 'harm' ii. 480; 613; 857; 'guilt' ii. 161; iv. 104. Celsus (e.g. v. 27. § 3; vii. 26. § 4) and Columella (e.g. *noxam capere* or *contrahere* or *concupere* 'to take harm' vi. 2. § 2; 27. § 8; xii. 3. § 7) have *noxa*, in the sense of physical harm. Pliny the elder has *noxia* and *noxa* frequently, perhaps always, in the lastnamed sense. Tacitus has *noxa* for physical harm in *Ann.* ii. 6; xv. 34; for 'harm' in *Ann.* iii. 73; and perhaps iv. 36; for 'guilt' in *Hist.* ii. 49; and *noxia* 'guilt' in *Ann.* vi. 4. Suetonius has *noxa* for 'crime' *Aug.* 67; *Tib.* 33; 'harm' *Iul.* 81, and perhaps *Oth.* 10 (*ne cui periculo aut noxae apud victorem forent*). Other lay writers have the words but rarely. See the large collection in Voigt's *Bedeutungswechsel*, p. 125 sqq.

(e) The notion that *noxa* meant 'punishment', supported by Festus p. 174, and Servius ad *Aen.* i. 41, is probably due to misunderstanding the expressions *noxae dedere*, *noxam merere*, *noxa solutus*, and possibly some others. But compensation, not punishment, is the aim of *noxae dedere*, compensation either in money or in the bodily labour of the delinquent. It was a civil, not a criminal, remedy. Nor is there any expression which requires such a meaning as punishment. *Noxam merere* (Liv. viii. 28. § 8 *ne quis, nisi qui noxam meruisset donec poenam lueret, in compedibus aut in neruo teneretur: pecuniae creditae bona debitoris, non corpus, obnoxium*<sup>1</sup> *esset*; Petron. 139) like *noxiam commerere* (Plaut. *Most.* 1178 *quasi non cras iam commercem aliam noxiam*; cf. *merita noxia*, *Trin.* i. 4), means 'to get guilt', i.e. 'commit a fault' or 'crime' (cf. *culpam merere*).

(f) *Noxia* is not very frequent in the lawyers. It occurs in *lex Rubr.* xxii. *obligatum eius rei noxiaeue*; D. ix. 1. 11. pr.; 4. 12. § 1; 14. pr.; 1 20; xvii. 1. 1 48. pr.; xxi. 1. 1 17. § 18; xxx. 1 45. § 1; xlvii. 9. 19; l. 16. 1 238. § 3. In *Inst.* iv. 8 Justinian has in conformity with his theory substituted *noxia* throughout for Gaius' *noxa*.

(g) *Noxa* is very frequent in the lawyers, especially in the phrases *noxā solutus* and *noxae dedere*. The edict of the curule aediles prescribed *Qui mancipia uendunt, certiores faciant emptores, quid morbi uitiiue cuique*

<sup>1</sup> 'liable for the money lent', like *pecuniae iudicari, sponsionis damnatus*, &c., *Lat. Gr.* §§ 1324, 1325. *Obnoxius* is formed directly from *ob noxam* or *ob noxiam* (*Lat. Gr.* § 990), 'liable on account of harm done' (cf. Liv. ix. 10. § 4) hence generally 'liable', 'exposed'. Cf. Verg. *Aen.* 1. 41 *Unius ob noxam et furias Aiacis Oilei*; Liv. vii. 4. § 5; xxviii. 28 fin.; Gai. i. 13 *Serui de quibus ob noxam quaestio tormentis habita sit et in ea noxa fuisse conuicti sint*. Liv. xxi. 30. § 3 is noticeable, *Indignati, quod, quicumque Saguntum obsedissent, uelut ob noxam, sibi dedi postulare populus Romanus*. *Ob noxiam* is in Plaut. *Poen.* 141; *Trin.* 1; 4; *Truc.* 834.

*sit, quis fugitius errore sit, noxae solutus non sit* (D. XXI. 1. 1 1. § 1), i.e. sellers of slaves were to tell buyers what disease or defect each slave had which was a runaway or truant, or not free from guilt, i.e. who had committed some deed for which his owner had not made amends and for which consequently the purchaser, or any owner for the time being, would be called on to make amends or surrender him (D. XXI. 1. 1 17. § 17). Accordingly a common covenant in the sales of slaves ran *Puellam sanam esse, a furtis noxisque solutam, fugitivam erronem non esse praestari* (ap. Bruns, Pt. II. 11. 2, see also 1). Cf. D. XIX. 1. 1 11. § 8; 4. 1 2; XLVII. 6. 1 3. pr., &c.; Sen. *Controv.* 21. § 23. A like covenant in the sale of animals is given by Varro *R. R.* II. 4. § 5 *Illasce sues sanas esse, habereque recte licere, noxisque praestari, neque de pecore morboeso esse, spondesne?* (See above note on l. 9. pr. *recte* p. 68.) In Livy XXIII. 14. § 3 *noxae exsolui* is used of those who had committed criminal offences.

(h) *Noxae dedere* is found in Liv. XXVI. 29. § 4; Ov. *F. I.* 359; Colum. *r. Proem.* § 3; D. II. 9. 1 1; IX. 1. 1 1. §§ 14, 15; 2. 1 27. § 2; 4 *passim*; XXXIII. 8. 1 6, &c. In an early state of society the claim of the injured party was very likely a claim for the surrender of the offender (cf. Bekker *Actionen* I. p. 186 n.). At least in state-action religious obligation took this direction (Liv. VIII. 39. §§ 10—15; IX. 8. § 4; 10. § 9 quoted above). But in Roman law, as we know it even from the time of the XII. tables, the obligation was to compensate pecuniarily the injured party: if the offender or his superior could not or would not do this, the offender was liable to be taken personally by the injured party and made to work off the debt or be sold in slavery (cf. Rudorff, *R. G.* II. §§ 89, 90). For freemen this mode of execution was altered subsequently: but in the case of slaves there was no such reason for alteration. If not defended, he was liable to be led off by the command of the Praetor and became the property of the plaintiff (*iussu praetoris ductus in bonis fit eius qui duxit* (D. II. 9. 1 2; IX. 4. 1 26. § 6). But the failure to defend the slave may be due to absence of those interested; and then, on proper cause being shewn, the owner, or in his default a usufructuary or mortgagee, is allowed to have the slave produced and the case to be tried (ib. also l 30). If the case be proved, the owner has the option of either paying the damages or surrendering the slave, which would be done in the regular form of conveyance (*mancipio* or *in iure cessione*, afterwards *traditione*). If the fructuary or mortgagee or a *bona fide* possessor defended, they could only deliver (*tradere*), but the plaintiff would be secured by being allowed a plea of fraud (*dolus malus*) against any attempt on the part of the owner to claim the slave, without satisfying the plaintiff (D. IX. 4. 1 11; 11 27, 28). If the owner falsely denied possession of the slave or had fraudulently lost possession (*dolo desiit possidere*), he was deprived of the option and had to pay the damages. He was deemed to be in possession, if the slave was lent or deposited elsewhere, and even if he was pledged, provided the owner had money available to redeem him (ib. l 20, l 21). The plaintiff had the choice of enforcing his

right, either against the owner, if he had fraudulently lost possession, or against the actual possessor (l 24). Surrender of a slave once made frees the defendant from any further action for other offences of the slave at the suit of the same or other plaintiffs (l 14). But if, instead of surrendering the slave, the owner has preferred to pay damages, he remains liable for other offences (l 20). The slave's death before trial freed the owner in any case (l 26. § 4). If the offence charged was insult (*iniuriarum*), the defendant had the additional option of merely allowing the slave to be flogged (*uerberandum exhibere* D. XLVII. 10. l 17. § 4).

(i) If the owner or other defendant could have prevented the slave's offence and did not, he had no option of giving up the slave. The slave is then deemed to be merely the master's instrument and he, not the slave, is answerable, unless the plaintiff choose otherwise (D. IX. 4. l 4). The refusal of the option is expressed by *detracta noxae deditio*, or *sine noxae deditio*, as opposed to *cum noxae deditio* (ib. l 4; l 5; l 21. § 2; XXXIX. 4. l 1 fin.; &c.).

(k) A *filius familias* was allowed to defend himself (l 33). Justinian abolished *noxae deditio* in the case of children (*Inst.* IV. 8. § 7). They were held liable to the judgment if condemned for torts, and the father was only liable to the extent of the *peculium* (D. IX. 4. l 35). A slave (e.g. a *statuliber*) who became free after the offence was liable himself, but, if he were manumitted subsequently to the offence, the plaintiff could proceed against either master or freedman (l 14. § 1; l 15; l 24; Gai. IV. 77).

(l) The actions which are expressly mentioned as having this noxal character were *furti*, *damni iniuria*, *iniuriarum*, *vi bonorum raptorum* (Gai. IV. 76), *interdictum de vi* (XLIII. 16. l 1. § 15), *quod vi aut clam* (ib. 24. l 14), some actions *in factum* (D. IX. 3. l 1. pr.; l 5. § 6), *arborum furtim caesarum* (XLVII. 7. 17. § 5), *de sepulchro uiolato* (12. l 3. § 11), and in some cases *doli mali* (D. IV. 3. l 9. § 4); and perhaps others.

(m) Liability of a slave (or others) to a criminal prosecution was not affected by this proceeding; cf. D. XLVII. 2. l 93; XLVIII. 2. l 12. § 4.

(n) A similar action was allowed against the owner, at the time of action, of a four-footed beast (not being *fera*) or other animal, if the beast without cause, except from its own wildness of nature (e.g. a kicking horse, a fierce bull or dog) caused damage directly or indirectly. (*Actio de pauperie* D. IX. 1.)

(o) Ulpian compares *noxae deditio* with putting a man in possession of a dangerous building for which the owner neglects to give security (D. XXXIX. 2. l 7. § 1; and note above on l 7. § 1 (p. 56). Just as in that case the man so put into possession eventually, if security is not given, obtains effective possession and ownership, so the man to whom the slave is surrendered is made owner (though not by continued possession, but by actual conveyance). A passage of Papinian in *Collat.* II. 3, tells us that a *filius familias* was not bound for ever. *Per hominem liberum noxae deditum si tantum adquisitum sit quantum damni dedit, manumittere cogendus*



*est a praetore qui noxae deditum accepit.* The same rule is extended to slaves by Just. iv. 8. § 3. But no mention of this is found elsewhere (unless *liberabitur* be so taken in D. vii. 4. l 27 on which see note below on l 34. pr. *si sub condicione*). It may be an alteration of Justinian's. See Mandry, *Familiengüt.* II. p. 617.

**iure non peremit**] 'does not destroy in point of law', i.e. the right of the fructuary is not put an end to, though no doubt the practical exercise of it is suspended. It is obvious that the claim of the injured party is as good against the fructuary as against the bare owner. If the fructuary retains the slave's services, how is the injured party to get any compensation? But a change in the proprietor of the slave does not of itself have any effect legally on the usufruct. The effect comes from the superior equity of the injured party. Cf. D. vii. 4. l 19 *Neque ususfructus neque iter actusue dominii mutatione amittitur*; ix. 4. l 27 (speaking of the present case) *Ususfructus etiamsi persecutio eius denegetur, ipso iure durat eo usque donec non utendo constituto tempore pereat.*

For the use of *peremit* in this sense cf. D. vii. 4. l 1. § 3; II. 9. l 1 fin.; xli. 3. l 44. § 5 (quoted below); xli. 3. l 75, &c.; Gai. III. 21; iv. 58.

**non magis quam usucapio prop.**] 'any more than the acquisition by long use of the ownership destroys a usufruct created previously'.

**usucapio**] It is well to distinguish here clearly four things: (a) *usucapio rei*, (b) *usucapio servitutis*, (c) *usucapio libertatis servitutis*, (d) *amissio servitutis non utendo*.

(a) The strictness and inconvenience of the old forms of conveyance was likely to cause much property to be for a time held on an insecure tenure. The defect was remedied by allowing uninterrupted possession of a moveable for one year, of landed property for two years, to give full rights (*ius Quiritium*) to a previously insecure tenure. But honest belief (*bona fides*) and an apparently lawful origin (*iustus titulus*) are essential conditions. Honest belief is necessary only at the time of acquisition: subsequent knowledge of the defect in title does not impair the process. A 'just title' is such as arises from actual purchase, gift, legacy. It was not a just title if a man thought he had purchased a thing, when really it was lent him, or thought it was left him as a legacy, when the testator really had not referred to it in his will at all. But it is a 'just title' if a man purchased it, although the vendor had no power to sell; or received it as a legacy when the testator had no property in it at all, or was still alive (D. xli. 8). Acquisition by delivery when the thing ought to have been mancipated, and acquisition from a person whose own title was bad, were the cases in which usucapion was most often effective. Some things were excluded from its operation, e.g. sacred and public property, freemen, things stolen, or taken by force (Gai. II. 45 sqq.), a *fundus dotalis* (D. xxiii. 5. l 16; cf. Cod. v. 12. l 30). Moreover all provincial lands were excluded, and no foreigner was capable of acquiring anything by usucapion.

These last two limitations of usucapion were probably the cause of an

analogous institute being adopted. A plea (*exceptio* or *praescriptio longi temporis* or *longae possessionis*) was given to a possessor in good faith and with a good commencement of possession (i.e. *iustus titulus*). Its applicability to moveables was definitely enacted by M. Antoninus Caracalla (D. XLIV. 3. 1 3; 1. 9). The period, fixed apparently by some imperial decrees (D. XVIII. 1. 1 76. § 1), was ten years if the contesting parties had been present, twenty if absent. Later on, not merely a plea but a right of action to recover property so possessed was granted (Cod. VII. 34). And claims of mortgagees as well as owners were extinguished by this lengthened possession without their being pressed (Cod. VII. 36).

Justinian no longer distinguishing between *res Mancipi* and *res nec Mancipi*, between Italian and provincial land, (Caracalla had made all freemen Roman citizens A.D. 211, D. I. 5. 1 17), enlarged the period of usucapion and fixed the period alike for all immoveables at ten years *inter praesentes*, twenty *inter absentes* (defining presence, and absence, see above p. 44), and for moveables at three years. The possession of a predecessor in title was allowed in all cases to be counted in the period (Cod. VII. 31; 33. 1 12). The words *usucapio* and *longa possessio* &c. are left in the law writers, but mean for Justinian the same thing.

A still longer period of 30 and 40 years was allowed by Justinian to give not only a plea against claims (as had been practised since Constantine) but also a right of action, provided only the possession had commenced in good faith. A lawful beginning was not necessary, and stolen things were (according to most jurists) not excepted.

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(b) Servitudes, being incorporeal things, could not be established by usucapion (D. VIII. 1. 1 14. pr.; XLI. 1. 1 43. § 1; 3. 1 10. § 1). Notwithstanding this, we find a number of passages in both Digest and Code in which an acquisition of servitudes (*longa consuetudine*, &c.) is spoken of as existing: D. VIII. 2. 1 28; 5. 1 10. pr. *Si quis diuturno usu et longa quasi possessione ius aquae ducendae nactus sit*, &c.; 6. 1 25; XXXIX. 3. 1 1. § ult.; XLIII. 19. 1 5. § 3; Cod. III. 34. 1 1; 1 2. The action granted was however *utilis*, and the right must have arisen therefore under the practice of the courts. The origin of the right had not to be proved: it was necessary only that for so many years the defendant or claimant had used it and that the use had been neither by force nor stealth nor permission. *Sane et in servitutibus hoc idem sequimur, ut ubi servitus non invenitur imposita, qui diu usus est servitute neque vi neque precario neque clam, habuisse longa consuetudine velut iure impositam servitutem videatur* (D. XXXIX. 3. 1 1 fin). The cases mentioned are all rural or urban servitudes: but Justinian (Cod. VII. 33. 1 12. § 4) expressly makes his regulative provisions for *longi temporis praescriptio* applicable to usufruct as well as to the other servitudes.

The apparent discrepancy between the passages which deny usucapion to servitudes and those which admit protection to long use is due to the nature of servitudes themselves. Possession, putting into possession, turning out of possession, gaining a right by continued possession, are all

conceptions based on facts applicable to things, but they are not except artificially applicable to rights of way, rights to unobstructed light, rights to support, and rights of using and taking the fruit. A right of way cannot be continually exercised, a right of light can only be shewn when a person interferes with it, a usufruct has to exist concurrently with the fuller right, dormant only for a time, of the owner of the thing. Yet in all these cases there is something analogous to possession, and that is the exercise of the right when the person entitled desires to exercise it. But such exercise, or power of exercise, is not strictly possession (cf. D. IV. 6. 1 23. § 2 *fundi possessionem uel usufructus quasi possessionem amisit*); and accordingly, as one aspect or the other is presented to view, writers deny or assert possession of such rights. The Romans denied the applicability of usucapion, but they were in equity eventually driven to protect it by long possession, just as they admitted a *iuris quasi possessio*, while they denied *possessio*, just as they spoke sometimes of *tradere usumfructum*, sometimes of *inducere in fundum fruendi causa*, and in some cases recognised the right of servitude-holders to interdicts for disturbance. Cf. D. VIII. 1. 1 20; VI. 2. 1 11. § 1; XLI. 2. 1 52; XLIII. 16. 1 3. § 13 sqq.; 1 9. § 1; Savigny, *Besitz*. § 12.

One passage of the Digest (XLI. 3. 1 4. § 28) says that a *lex Scribonia* (date unknown) abolished *eam usucapionem quae servitutem constituebat, non etiam eam quae libertatem praestat sublata servitute*. When, how long, and in what way usucapion was thus applicable to found a servitude we do not know. Unterholzner (*Verjährungslehre*, § 196=II. p. 135 ed. 2) aptly refers to Gaius II. 54 for an analogous case of an incorporeal right, viz. an *hereditas*, being once regarded as admitting of *usucapio*, though afterwards the view was abandoned.

(c) The passage just quoted from the Digest speaks of *usucapio libertatis servitutis*, and instances a person, occupying under a servitude not to build higher, who, by building higher and keeping the house so built for the required time, establishes his freedom from the servitude. If he had done this only by permission (*precario*), the servitude would continue (D. VIII. 2. 1 32. pr.; 4. 1 17). All servitudes were lost by non-use, but urban servitudes were not lost unless this non-use was practically enforced by the servient party's maintaining continuously for the required period an obstruction. This arises from the nature of the servitudes themselves, which do not consist in discontinuous acts of the dominant party which have to be permitted by the servient, but in a continued state of light, prospect, support, drainage, &c., which require no series of acts by the dominant party to declare the existence of the servitude. See D. VIII. 2. 1 6. Hence if the servitude is to be destroyed, continuous disturbance must be made by the owner of the servient tenement. Other servitudes, viz. rural servitudes and personal servitudes, might be destroyed in the same way by interference on the part of the servient party, for this interference, if submitted to, brought the dominant party into the same condition of non-

cf. L. A. A. E. G.  
vs. K. T. C. 14  
R. pp. 160.



user, which mere neglect without challenge from the other party would do. The periods for gaining freedom from servitudes were the same as for losing by non-use.

(d) Non-use under the old law for a period of two years occasioned the loss of urban and rural servitudes: in the case of usufruct for a period of one year, if the thing was moveable: two years, if immoveable (Paul. *Sent.* I. 17. § 1, § 2; III. 6. § 30); Justinian brought them under his general rules for *longa possessio* Cod. III. 34. 1 13; 32. 1 16. See above note on 15 *legitimo tempore* (p. 44).

**usucapio proprietatis]** This would be the same as *usucapio rei*. To gain the thing and the ownership of the thing are in the case of usucapion identical. But the usucapion of a thing of which another has the usufruct, is in effect the usucapion only of the reversion, and this as usual is here expressed by *proprietas*. Cf. Papinian D. XLI. 3. 1 44. § 5 *Non mutat usucapio superueniens pro emptore uel pro herede quo minus pignoris persecutio salua sit: ut enim usufructus usucapi non potest, ita persecutio pignoris, quae multa societate dominii coniungitur sed sola conuentione constituitur, usucapione rei non peremitur*. There *us. fr. usucapi non potest* does not refer to any abstract impossibility of acquiring a usufruct by a usucapion, but to an existing usufruct not being affected by a usucapion of the reversion (Unterholzner, *Verjähr.* note 614). In what way the continued possession by a usucapient of the ownership could practically take place and be in evidence, while a fructuary was *de facto* in possession, is a question of fact, dependent on circumstances.

**quae post constitutum u. f. contingit]** If the usucapion was complete before the establishment of the usufruct, the former owner could of course have no power to grant a usufruct. If the usufruct had been granted by stipulation, the usufructuary being ousted would have his remedy on the covenant against the promiser and his heirs; if it had been granted by will, then he would have his remedy *ex testamento* against the heir.

**debebit plane denegari]** i.e. by the court before whom a suit for the usufruct is brought. Cf. D. IX. 4. 1 27 (Gaius) *Si noxali iudicio agitur de seruo qui pignoris iure tenetur, aut de eo cuius usus fructus alterius est, admonendi sumus, si creditor uel usufructuarius praesens defensionem suscipere noluerit, proconsulem interuenturum et pignoris persecutionem uel usus fructus actionem negaturum. Quo casu dici potest ipso iure pignus liberari (nullum enim pignus est cuius persecutio negatur): usus fructus autem, etiamsi persecutio eius denegetur, ipso iure durat eo usque, donec non utendo constituto tempore pereat*. If the plaintiff's claim was not settled by surrender of the slave, and damages were assessed, the usufructuary was compelled (*per praetorem id consequar ego dominus proprietatis, &c.*) to pay his share proportioned to the value of his usufruct, or to give up the usufruct to the proprietor (ib. 1 17. § 1). The plaintiff in the noxal suit need not wait for the fructuary or mortgagee to evict

him: he has by the judgment a right to the damages or to the full ownership of the slave, and can thus force the proprietor, if he prefer to surrender the slave, to surrender him free from usufruct or mortgage. To obviate a further suit by the proprietor against the usufructuary or mortgagee the Praetor deals with the rights of all parties (D. XLVI. 3. 1 69).

**persecutio**] A general term for a suit, i.e. legal proceedings for 'following up' one's right. It is especially used where *actio* or *petitio* are not so suitable, e.g. D. XX. 1. 1 17 *Pignoris persecutio in rem parit actionem creditoris*, i.e. an *actio in rem* is the proper proceeding: XIII. 1. 1 7. § 2 *Condictio rei furtivae, quia rei habet persecutionem, heredem quoque furis obligat* (as opposed to a mere claim for damages); of *fideicommissa*, Gai. II. 282 *Si legatum per damnationem relictum heres infitietur, in duplum cum eo agitur: fideicommissi uero nomine semper in simplum persecutio est*; D. L. 16. 1 178 *Persecutionis uerbo extraordinarias persecutiones puto contineri, ut puta fideicommissorum, et si quae aliae sunt quae non habent iuris ordinarii executionem*. Hence it is added to *actio* and *petitio* in the Aquilian stipulation (D. XLVI. 4. 1 18). But it is also used synonymously with *actio* and *petitio*, e.g. of the *operae libertorum* (XXXIX. 1. 1 2; 1 4. § 4; but *actio* § 5; *petitio* § 9), &c. The three are thus distinguished by Papinian in D. XLIV. 7. 1 28 *Actio in personam infertur: petitio in rem: persecutio in rem uel in personam rei persequendae gratia. Persequi corresponds to persecutio*, e.g. Gai. II. 278; IV. 6—9.

**noxae accepit**] *accepit* is the converse of *dedidit*. A fuller phrase is used by Papinian, *Coll.* II. 3, *qui noxae debitum accepit*.

**litis aestimatio**] 'the valuation of the suit' (Gai. IV. 94) i.e. 'the damages ascertained by the suit'. Whatever the nature of the suit, whether to establish a right, to recover an article of property, to get compensation for a breach of contract, or for a tort, the condemnation was always for the defendant to pay so much money to the plaintiff. In actions for torts committed by slaves or children in power, or beasts, the surrender of the offending animal was an alternative course open to the innocent owner to take. The precise way in which this alternative was introduced into the formal proceedings has been disputed. Possibly the formula may have been drawn up by the Praetor with the condition, '*nisi Numerius Negidius (defendant) Aulo Agerio (plaintiff) Damam servum noxae dedat*'. But the extract from the edict given in D. IX. 3. 1 1. pr. seems clearly in favour of the condemnation in the formula being expressly in the alternative<sup>1</sup>. Thus Rudorff (*Edict.* § 69) gives as the formula in a noxal action for a tort under the *lex Aquilia*: *Iudex esto. Si paret illum Aulo Agerio servum ab illo seruo Numerii Negidii iniuria occisum esse, quanti is homo in eo anno plurimi fuit, tantae pecuniae in duplum*

<sup>1</sup> O. Lenel (*Ed. Perp.* p. 154) thinks (with good reason) that the noxal clause is actually given in D. IX. 1. 1 1. § 11 *Quam ob rem aut noxam (noxiam Lenel) sarcire aut in noxam dedere oportet*, but puts it in the *intentio* of the formula.

*aut noxae dedere iudex Numerium Negidium Aulo Agerio condemnato: si non paret absolutio* (cf. D. ib. l 5. § 6; XLVII. 2. l 42. pr.). Then the judge having heard the case and ascertained that the slave was guilty, gave the defendant the option. If the defendant declined to give up the slave, the judgment would be pronounced no longer in the alternative but for the ascertained damages, which the plaintiff would proceed to enforce by bringing an action on the judgment. The law still gave the defendant the chance of avoiding this payment by surrendering the slave, but only till issue was joined. After that he must pay the damages. This view accords with the following two passages: D. v. 3. l 20. § 5 *Tamdiu quis habet noxae dedendae* (should be *dedendi*) *facultatem, quamdiu* ('until') *iudicati conveniatur; post susceptum iudicium non potest noxae dedendo se liberare*; XLII. 1. l 6. § 1 (a stipulation couched in the alternative either to pay ten guineas or to give up a slave must be sued on in the alternative and not merely the ten guineas claimed) *At iudicium solius noxae deditiois nullum est sed pecuniariam condemnationem sequitur. Et ideo iudicati decem agitur* (suit on the judgment is brought for ten guineas), *his enim solis condemnatur: noxae deditio in solutione est quae e lege tribuitur*. The decision of the judge referred to in *Inst.* iv. 17. § 1 I take to be the preliminary decision (*pronuntiatio* cf. Bethmann-Hollweg, II. pp. 240, 624) by which an option was expressly given to the defendant. (Vangerow, *Pand.* § 689 n. 2, takes *condemnatio* in D. XLII. l. c. of the formula, and refers *Inst.* iv. 7 to the actual final sentence. So at least I understand him.)

**offeratur a fructuario]** See above note on *debebit plane denegari* (p. 140).

§ 3. **utilem actionem]** *Utilis* was a term very frequently given to actions allowed by the Praetor in circumstances, which did not come within the strict letter of a statute, but were analogous to those which did. *Utilis* is opposed to *directa actio* (e.g. D. ix. 2. l 13. pr.) and means 'practicable', 'available'. The formula to the judge in such cases often took the shape of a fiction, i.e. a *bonorum possessor* was to be treated by the judge as if he were *heres*; or a man who had delivery of a thing on a just title and had lost the possession, is to be treated as if he had already gained the full ownership by usucapion: or a foreigner is allowed to sue for theft or other tort, as if he had been a Roman citizen (Gai. iv. 34—38). In other cases the facts justifying the action were set out in the formula and the judge directed to find accordingly. *Actio in factum* is the term then used. But the terms are not at all opposed to one another: indeed the same case is often spoken of under the name of *act. utilis* and *act. in factum*. Compare D. ix. 2. l 9. § 3 or l 53 with XLVII. 2. l 50. § 4; l 51; and ix. 2. l 9. § 2 or l 29. § 7 with XLVII. 8. l 2. § 20. See note on l 13. § 2 *lege Aquilia* (p. 99). For instances of *utiles actiones* cf. D. XIX. 1. l 13. § 25 *ad exemplum institoriae actionis*; XXXVI. 4. l 5. § 21 *exemplo pigneratitiae actionis*; XXXIX. 1. l 3. § 3; XLIII. 18. l 1. §§ 6—9, &c.; *utile interdictum* XLIII. 8. l 2. § 39.



So *Superficiarium et fructuarium damni infecti utiliter stipulari hodie constat* (D. xxxix. 2. 1 13. § 8 i.e. can stipulate though not strictly entitled to demand it); *de dolo utiliter replicari posse* (D. ii. 14. 1 35 fin.).

**fructuario dandam]** The same is laid down in D. ix. 2. 1 11. § 10: and even applies if the slave has been killed by the proprietor (ib. 1 12). Similarly a *bonae fidei* possessor and a mortgagee have an *actio in factum* against the proprietor (ib. 1 17). The proprietor has a direct action against the usufructuary under the *lex Aquilia*; see above 1 13. § 2; 1 66.

**1 18. demortuarum arborum]** ‘that have died off’. The word is frequently and properly used of a death which leaves a place that has to be filled, e.g. Cic. Verr. iv. 5. § 9 *Sanxerunt ne quis emeret mancipium, nisi in demortui locum*: Liv. xxiii. 23. §§ 4, 5 *inde primos in demortuorum locum legit*; so of a vine, Colum. iii. 16. § 2; of animals, below 1 70; of persons, *succeditur in ius demortui*, D. xxxvii. 1. 1 3. pr. Trees blown down, without fault of the fructuary, he is not bound to replace (1 59. pr.). These latter are not part of the ordinary wear and tear of the estate like the former, but attributable to extraordinary disaster. And the duty of the fructuary is *modica refectio* only (1 7. § 2). Trees dying from age are taken by the fructuary as a kind of produce; trees blown down belong to the proprietor (1 19. § 1), unless the usufructuary requires them for the repair of the homestead or other proper use (1 12. pr.). *Arbores in locum mortuarum reponere* is a necessary expense on a dowry estate, and according to the circumstances will or will not entitle the husband to compensation (D. xxv. 1. 1 14; 1 15).

**1 19. pr. insulam]** A detached block, containing a number of rooms or sets of rooms (*cenacula* Varr. L. L. v. § 162, flats, apartments, ‘suites’) let to different persons. Such were usually occupied by poorer persons. Paul. Epit. Fest. p. 111 Müller. *Insulae dictae proprie, quae non iunguntur communibus parietibus cum vicinis, circuituque publico aut privato cinguntur; a similitudine uidelicet earum terrarum quae fluminibus ac mari eminent suntque in salo*. The suites of rooms sometimes had stairs from the street; see note on 1 13. § 7 *aditus* (p. 111) and D. xliii. 17. 1 3. § 7. The *insulae* appear not to have had more than four stories. The porters were *insularii* (D. i. 15. 1 4; vii. 8. 1 16. § 1). The lodgers were *inquilini*. The legal relation between owner and lodger was usually that of letting and hiring (D. xix. 2. 1 19. § 4—§ 6; 1 25. § 2; 1 27; 1 30. pr., &c.; xiii. 7. 1 11. § 5), but a man may own part of a house or have it on long lease, and then both the object of the right and the right itself was called *superficies*, and the holder was entitled to an interdict (D. xliii. 18). On this right see Schmid, *Hdbuch*. § 25 sqq.; on the *insulae*, Becker’s *Gallus* ed. Göll, ii. p. 219 sqq.

**insulam posse ita legari]** The Greeks, as Mommsen notes, appear to have read *insulae usumfructum*. At any rate they so understood the passage. Steph. has οἶκον δύνασθαι οὐσουφρούκτον οὔτω ληγατεύεσθαι, ἵνα δουλεία τις

ὡσπερ ἀγρῷ ἐπιτέθη. So also Bas. and the commentator Cyrillus. The passage has difficulties (see Hasse, *Rh. Mus.* i. p. 87; Elvers, *Servituten*, p. 704). (1) How can a *servitus* be said to be imposed when it is created only for the duration of a usufruct, and on property which belongs to the owner of the dominant tenement also, for *nulli res sua servit* (D. VIII. 2. l 26)? (2) The second mode given by Pomponius does not constitute an urban servitude at all, but merely establishes a usufruct to last so long as the house is not built higher. (3) What is the good of such a servitude, when the fructuary even without it cannot build higher without the consent of the owner: above, l 13. § 7? Hasse takes *usumfructum* as meaning ownership, which is quite impossible. Elvers takes *imponere servitutem* as not used in the strict sense, but only as practical arrangements for such a purpose, and suggests that such a stipulation would have given the heir a ready means by a penal clause of enforcing the servitude in favour of his own house, and one which would apply even if he sold the reversion of the servient house. It seems to me that we shall best understand Pomponius' point of view by taking this passage in connexion with the extract (from the 8th book of the same work of Pomponius) which is D. VIII. 4. l 8. *Si cum duas haberem insulas, duobus eodem momento traditis, videndum est an servitus alterutris imposita valeat, quia alienis quidem aedibus nec imponi nec adquiri servitus potest. Sed ante traditionem peractam suis magis acquirit vel imponit is qui tradit, ideoque valebit servitus.* In both passages the question is how to establish a servitude on one lodging-house in favour of another: and the answer in the passage just quoted is that you must not deliver them at the same time, but on the delivery of the first must reserve a servitude for the one still retained, or impose it on that in favour of the one delivered. So only can you avoid the double difficulty of a servitude being imposed on one of your own houses in favour of another of your own houses; and of your having no right of imposing a servitude on what has actually become another's house (D. VIII. 4. l 3; l 6. pr.). The question occurs, how does this stand as regards legacies by vindication whereby the legatees are at once owners of the estates directly the inheritance is entered on (Gai. II. 195)? The answer to this would I suppose be that the legacies must be taken as the testator directed, and the one legatee takes therefore his estate together with a right of road, &c., over the other, and the other legatee takes his estate subject to allowing such right of road in favour of the first-named. Then comes the case of our text: how if one estate be left to the heir, and the other be granted in usufruct to the legatee? Can a servitude be imposed on this latter estate, the propriety of which remains to the heir, in favour of an estate also left to the heir? And the answer is (so far I agree with Elvers in reference to the two difficulties first named): strictly speaking it cannot, but the testator may practically accomplish it by making a contract to allow the usufruct a condition precedent to the usufruct, or the disallowance of it a condition revoking the usufruct. When the usufruct is over, the

heir can arrange for himself. For the third difficulty Elvers partly supplies a solution. So long as the obligation not to build rests merely on the general law of usufruct, it is not a servitude in favour of a particular house. But if it rest on a stipulation with, as is usual, a penal clause (see note on 13. pr. *pactionibus*, p. 38), it is available for the heir after selling the reversion of the servient house and for a purchaser or other successor of the dominant house (D. VIII. 3. 1 36). Moreover *ne aedificia tollantur* is here only an instance of servitudes in general: and the third difficulty would not apply to some other servitudes. There is nothing to prevent a fructuary allowing *precario* the occupant of a neighbouring estate to walk or drive across the estate in usufruct, or to allow a neighbour to project a balcony over the house or area in usufruct. But if the testator desire to impose such servitudes on the fructuary's estate or house in favour of another house belonging to him, our passage is applicable.

The Greeks (Stephanus and Cyrillus) understood the engagement in the first form (*per se non fore*, &c.) to be that the fructuary would not object to the heir building higher; that however would require *quominus* instead of *quo*. And it would require further alteration before we could understand the passage of the fructuary's house being under a servitude to allow of the heir's house being raised. *Ea aedificia* would then be different buildings from *eorum aedificiorum*, and the second form would relate to a different servitude to what the first did.

*ille*] This pronoun is frequently used, especially in the lawyers, for a hypothetical person, where we should say 'so and so', or 'one', e.g. D. x. 4. 1 19 *Nam illa ratione etiam studiosum alicuius doctrinae posse dicere, sua interesse illos aut illos libros sibi exhiberi*; XXXIX. 5. 1 32 *L. Titius epistolam talem misit: Ille illi salutem. Hospitio illo, quamdiu volueris, utaris*; XLVIII. 2. 1 3. pr., where the form of notice of accusation of adultery is given as follows: *Consul et dies. Apud illum praetorem vel proconsulem L. Titius professus est se Maeuiam lege Iulia de adulteriis ream deferre, quod dicat eam cum C. Seio in ciuitate illa, domo illius, mense illo, consulibus illis adulterium commisisse*; Gai. IV. 46. So Hygin. *de condit. agror.* (p. 114. ed. Lachm.) *ex colliculo qui appellatur ille, ad flumen illud, et super flumen illud ad riuum illum, aut uiam illam, et per uiam illam ad infima montis illius, &c.*; Cic. *Rosc. Am.* 21. § 59 *Credo cum uidisset, qui homines in hisce subselliis sederent, quaesisse num ille aut ille defensurus esset.*

*per se non fore quo*, &c.] 'that it shall not be his fault, if the buildings are carried up higher'. Such phrases are very common with *quo minus*, especially in stipulations of this kind, e.g. *Per te non fieri neque per heredem tuum, quo minus mihi ire agere liceat*, D. XLV. 1. 1 2. § 5; 1 38. pr., &c. So *lex Iul. Municip.* 15 (Bruns, p. 98. ed. 4) *Quo minus earum rerum causa eisque diebus plostra interdum in urbe ducantur agantur, eius hac lege nihil rogatur*; ib. § 7; § 12; § 18, &c. So *quo magis* D. XXXIV. 4. 1 14. pr., Gai. II. 235; and after *nihil prohibet*, &c. in the same sense as *quo minus*,



Cod. III. 1. 13; v. 34. 11. See note on l 36. § 2 *per heredem stare quo minus*, and for classical usage, see *Lat. Gr.* § 1644.

Such a promise imported not merely that the promiser would refrain from contrary action, but that he would take care that the thing is (or is not) done (D. XLV. 1. 150; l 83 pr.).

**do lego]** (a) 'give and bequeath', i.e. give and declare ('bequeath' being from the same Anglo-Saxon word as 'quoth'). *Lego* is from *lex*, 'the declaration' of the object and purpose of the transfer (*dare*). The word is as old as the XII Tables at least (*uti legassit suae rei ita ius esto* Gai. II. 224; see above, p. 49). On *lex* in this sense, see note above, p. 37. In the usual form of will (*per aes et libram* Gai. II. 103) the whole property of the testator was conveyed by mancipation with a declaration, originally made orally (cf. XII Tables ap. Fest. p. 173 *Cum nexum faciet mancipiumque, uti lingua nuncupassit, ita ius esto*), at a later period entered in tablets, and confirmed, as so written, by an oral declaration. This declaration made to the witnesses (hence *testari*, *testator*, *testamentum*) was in fact the will of the testator as to the disposition of his property. The formal words called *nuncupatio* as given by Gaius (ib. 104) were *Haec ita ut in his tabulis cerisque scripta sunt, ita do ita lego ita testor itaque vos, Quirites, testimonium mihi perhibetote*. The *do lego* would originally have reference to the heir who was the person to whom the conveyance and declaration was made. At a later period when (probably on account of the difficulty in securing the presence of the heir, e.g. *si testator subita morte urgebatur*, ib. 102), the mancipation was made to some one else, the *do lego* would be more general in its application, and would apply both to the heir and to any one who as legatee was to have the ownership directly conveyed to him by the will itself, and not by the agency of the heir in conformity to the will. (See note on l 3 pr. *et sine testamento*, p. 35.)

(b) The other principal use of *legare* is in commissions to ambassadors and lieutenant-governors, as seen especially in the substantive *legatus*. 'Appoint' in English applies in the same way to persons as well as to specific disposals of property, and would fairly correspond to *legare*.

(c) By the lawyers '*do lego*' was sometimes used without any syntactical construction as a kind of adverbial or adjectival phrase to denote a legacy *per vindicationem*, of which Gaius says *Per vindicationem hoc modo legamus 'Titio' uerbi gratia 'hominem Stichum do lego'* adding that *do* by itself, or *lego*, or even according to the better opinion *sumito*, or *sibi habeto*, or *capito* would have the same effect. *Ideo autem per vindicationem legatum appellatur quia post aditum hereditatem statim ex iure Quiritium res legatari fit* (II. 193, 194). Hence in the Vat. Fr. we have *per do lego legatum et per in iure cessionem et deduci et dari (ususfructus) potest* (§ 47 Paul.); *ususfructus do lego seruo legatus* (§ 57 Paul.); *in do lego legato* (§ 75. 1 Ulp.); *si duobus do lego ususfructus legetur* (§ 83 Ulp.); *in do lego legato non esse ius adcrendi* (§ 87 Ulp.): and Paul. Sent. III. 6. § 26 *Coniunctim duobus ususfructus do lego legatus, altero mortuo, ad alterum in solidum pertinebit*.

**quoad]** 'so long as'. Cf. II. 14. 1 52. § 3 *De inofficioso patris testamento acturis, ut eis certa quantitas, quoad uiueret heres, praestaretur, pactus est*; X. 2. 1 39. § 2; XLII. 4. 1 5. § 1; but its original meaning of 'until' is in D. XXV. 4. 1 1. § 10 (several times); XLV. 1. 1 9; XLVIII. 5. 1 4 pr. Both meanings are found in classical Latin (*Lat. Gr.* §§ 1667, 1669). The reverse change is found in *quamdiu* which originally meaning 'as long as' came to mean 'until' *infr.* 1 70. § 1.

§ 1. **arbores uento deiectas]** Trees blown down by the wind belong to the proprietor, except that the fructuary is entitled to take them, so far as may be required for the repairs of the homestead (1 12 pr.). Consequently the fructuary is not bound to replace them (1 59 pr.).

**per quod]** 'by which fact' = 'so that thereby'.

**incommodior sit]** The Flor. MS has *is* before *sit*; but it appears to be only a copyist's mistake.

**uel iter]** Probably a road to which the estate, of which he was usufructuary, was entitled. *Dominus* naturally means the proprietor of the same estate, but it may include also the owner of the estate over which the right of road lay.

**suis actionibus]** The plural does not imply that there was a number of different kinds of actions to which the usufructuary might resort, but that there might be several occasions. The regular action for the fructuary was the *uindicatio ususfructus* (commonly called the *confessoria* D. VIII. 5. 1 2. § 1), and this he could use against the proprietor of the estate in usufruct or against any possessor whatever who disturbed him in his usufruct, e.g. against the possessor of a neighbouring estate who disturbed his road, *Si fundo fructuario seruitus debeatur, fructuarius non seruitutem (sc. itinervis), sed usum fructum uindicare debet aduersus uicini fundi dominum* (D. VII. 6. 1 5. § 1; cf. VIII. 5. 1 4. § 5). Hindrance to his road was to be treated in the case of a fructuary as hindrance to his usufruct. So most lawyers (*ib.* 1 1 pr.; VIII. 5. 1 2. § 2): Julian had allowed him to claim the right of road itself (D. XLIII. 25. 1 1. § 4). If the non-removal of the trees amounted to a prohibition of the road, the fructuary could proceed by the *interdictum de itinere actuque priuato* (D. XLIII. 19. 1 5). If the road so obstructed was a public highway, he had the interdict *ne quid in loco publico uel itinere fiat* (*ib.* 8. 1 2. esp. § 12; § 40). But this last would not come under the term *suis actionibus*.

**usufr. cum eo experiundum]** 'the usufructuary must try the matter with him (i.e. sue him), by his proper actions'. The use of *cum* is noticeable in such matters. The idea seems to be that a conflict is a co-operation of two hostile parties to obtain a decision. Similarly *bellum gerere cum aliquo, fidem cum hoste seruare, pacem cum Romanis facere*. So the consuls and higher magistrates when proposing a law to the people were said *cum populo agere* (Cic. *Lael.* 25); cf. Gell. XIII. 16. § 2; § 3 *Aliud est cum populo agere, aliud contionem habere. Nam 'cum populo agere' est rogare quid populum, quod suffragiis suis aut iubeat aut uelit, 'contionem' autem*

'habere' est uerba facere ad populum sine ulla rogatione (cf. Mommsen, *Staatsrecht* 1<sup>2</sup>. p. 187). In private life *quod tecum egi* (Ter. *Haut.* 595) 'what I discussed with you', or 'proposed to you'; *tecum oravi* 'spoke with you' i.e. asked you; *quod agas necum ex iure civili ac praetorio non habes* (Cic. *Caecin.* 12. § 34); 'you have nothing to do with me (i.e. 'no ground for an action') either from the civil or praetorian law'. So frequently *cum quo agitur* for the 'defendant', opposed to *qui agit* for the 'plaintiff'. Our present phrase is found in Gai. iv. 163; D. iii. 5. 1 32 (33), &c.; *adversus aliquem* esp. D. ii. 4. 1 10. § 4. *Experiri* in this sense of 'sue' is convertible with *agere*.

1 20. **fructus annuos]** The same decision, referred back to Labeo, is given by Javolenus D. xxxiii. 2. 1 41. The 'annual' produce is taken to be equivalent to leaving a person the *fructus*, and the *fructus* was held to be equivalent to the *ususfructus* (D. vii. 8. 1 14. § 1; Paul. *Sent.* iii. 6. 1 24 *Fructu legato si usus non adscribatur, magis placuit usumfructum uideri adscriptum: fructus enim sine usu esse non possunt*). Hence the legatee would have the use of the estate as well, and would have the *actio confessoria* and interdicts to protect him. On the other hand he would be entitled to the fruits only on gathering them, and the right would cease on his suffering *capitis deminutio* and on his death. A similar but somewhat more beneficial legacy was a grant of the produce year by year (*in singulos annos* 1 25. § 2). Such a legacy, whether of the produce of a particular estate or of a sum of money (an annuity), or anything else, *in singulos annos*, 'for each year', was regarded as a series of legacies, each of which became due at the commencement of the year, the first vesting like any other legacy on the death of the testator and not being deferred till the heir's entry on the inheritance (D. xxxvi. 2. 1 12. § 3; cf. vii. 3). In case of death of the legatee, this legacy, like that of a usufruct, came to an end, but the legatee's heir was entitled to the payment of the annuity for that year, if it had not been already received by the legatee (D. xxxiii. 1. 1 4; 1 8; xxxvi. 2. 1 12). A usufruct *in singulos annos* was destroyed also by *capitis deminutio*, but only so far as that single year was concerned: with the next year commenced a new legacy unaffected by the *capitis deminutio* (D. vii. 4. 1 1; 1 2. § 1; 1 3. pr.; iv. 5. 1 10). Of course if the *capitis deminutio* was *maxima*, i.e. involved the loss of freedom, the legatee would, unless restored to his former position, be incapable of holding it again; if *media*, i.e. involved the loss not of freedom but of citizenship, the answer would be the same: for the usufruct would be regarded as a newly coming legacy and a non-citizen was incapable of taking such (Gai. i. 24, 25; Paul. *Sent.* iii. 4 a § 9; xlviii. 13. 1 3; 22. 1 15; 1 6). How the matter would stand, if the testament were made by a provincial in favour of provincials, is another question.

Stephanus assumes that a resemblance only is here spoken of. His words are βλέπε πῶς ἔχει τὸ ῥητόν· ὅμοιον εἶναι δοκεῖ ὥσπερ ἂν εἰ ὁ οὐσούφρουκτος ἐληγατεύθη. οὐκ εἶπεν ὅτι οὐσούφρουκτός ἐστιν ὁ λεγατευθείς, ἀλλ'



ἔοικεν οὐσουφρούκτῳ. And he finds the point of resemblance in the limitation of this legacy to the life of the legatee. The text of Bas. identifies the legacy with that of a usufruct (χρήσιν καρπῶν δοκῶ ληγατεύειν), and that appears to me to be right.

**perinde...ac si]** 'this language should be interpreted just as if'. *Perinde...ac si* is common in the Digest, e.g. III. 5. 1 34 (35) pr.; VIII. 4. 1 8 bis; XXXIV. 8. 1 2; XXXVIII. 4. 1 1 pr. &c., Ulp. I. 12; *Lex Malac.* 55. *Proinde ac* or *ac si* is also commonly so used by the lay writers (who however also use *perinde*), and by Gaius, e.g. I. 128; 134; 137; 148; 165, &c.; Ulp. XIX. 14. It is also (as Voigt *Ius Nat.* II. p. 729 shows) in grants to veterans *Corp. I. L.* III. p. 853 (A.D. 76); 891 (A.D. 216); 895 (A.D. 243); but seems to be rarely found in this sense in the Digest. It is so however D. XLVIII. 10. 1 29; L. 17. 1 205. Justinian has altered *proinde* in Gai. I. 128; 165; II. 87; 254 (Gneist's text is not to be trusted) into *perinde* in the corresponding passages of his Institutes, but has left *proinde* in those corresponding to Gai. III. 91; 176. In one place only of Gaius (III. 42) is *perinde* written in the MS in full. In three others the contraction for *per* is found—possibly by mistake. See Studemund's *Index Notarum* appended to his *Apographum* p. 286. Huschke notes (*Praef. ad Justin. Inst.* p. IX.) that in the first two books of the Institutes (which books he conjectures to have been drafted by Dorotheus) *perinde ac si* is several times put wrongly where *perinde ac* should be. It is noticeable that the alterations of *proinde* to *perinde* are only in the first two books.

*Proinde* in the Digest generally means 'accordingly', 'wherefore'. See note above on I 13. § 5 (p. 108).

**1 21. quidquid is, &c.]** See note on I 12. § 3 *stipulatus* (p. 86), and the passage of Gaius there quoted. The expression in our passage is more exact; *ex opera sua acquirit vel ex re fructuarii siue stipuletur siue ei possessio fuerit tradita*. Two bases of acquisition are named, viz. the slave's own services and the fructuary's goods: and two modes in which by the use of these an acquisition may be made, viz. stipulation by which an obligation would be acquired, and delivery by which property is conveyed, and a real action acquired. Stipulation covers the cases of contracts, whether the contract was for the sale or letting or pledging of the slave's services or of the fructuary's goods: it was usually secured by a stipulation; and delivery covers the acquisition of the property in the price paid for such sale or hire, or in the money taken up by the slave on mortgage, or in the articles sold or lent. Slaves were so frequently used for the management of business of various kinds, that the fructuary would lose the chief benefit of the usufruct of a slave, if he could not have used him as his own voice and hands with the full recognition by the law of the validity of the acts as those of the fructuary. But this is strictly limited in the case of the fructuary to acquisition on the two bases named, the slave's services or the fructuary's goods, and even with these the acquisition is divested in favour of the proprietor, if the slave expressly state in the

transaction that it is on behalf of the proprietor, or if he be acting by the order of the proprietor (1 25. § 3). The modes of acquisition named in the last part of the present law and in the next are all referable to the head of '*ex re fructuarii*'. See the notes.

**ex opera]** See note on 1 12. § 3, *cuius operae* (p. 88). The plural is more common in this matter. But cf. Gai. III. 149 (speaking of partnership) *saepe opera alicuius pro pecunia ualet*; XLI. 2. 1 1. § 20; XLIV. 7. 1 5. § 6 *Si modo ipsius (exercitoris) nullum est maleficium, sed alicuius eorum, quorum opera nauem aut cauponam aut stabulam exerceret*. In one point of view the *opera* or *operae* of a slave are themselves part of the property of the person entitled, whether owner or fructuary: *Nam et operae quodammodo ex re eius cui seruit habentur, quia iure operas ei exhibere debet* (D. XLI. 1. 1 23 pr.).

**ad eum pertinet]** 'belongs to him', i.e. the fructuary. So also in 1 7 pr.; 1 27 pr., &c., and cf. 1 27. § 3 *haec onera ad fructuarium pertinent*.

**siue stipuletur]** The Vatican Fragments § 71 b, though the ms is much mutilated, seem to show that originally '*siue mancipio accipiat*' preceded '*siue stipuletur*'. Cf. Gai. II. 87; Ulp. XIX. 18; and note on 1 12. § 3 *per trad. accipiat* (p. 87).

**siue ei possessio fuerit tradita]** Delivery of a thing, the property of which is to be transferred, is putting a person into exclusive possession of it; and hence delivery of the thing is the same as delivery of possession of the thing. Hence *tradere possessionem* is often used in the same meaning as *tradere rem*, but especially where there is some collateral distinction, e.g. between the delivery of the mere possession and the transfer of the ownership by the delivery, e.g. D. XLI. 2. 1 38. § 1 *Existimandum est possessiones sub condicione tradi posse, sicut res sub condicione traduntur* (cf. Savigny, *Besitz*. § 19. p. 245. ed. 7); or where the person actually delivering is merely in possession and not the owner (D. II. 14. 1 36). It is even used of a transfer of the legal, but not the actual, possession (D. VI. 1. 1 77). For instances in general, see D. XVIII. 1. 1 74 *Clauibus traditis ita mercium in horreis conditarum possessio tradita uidetur, si claues apud horrea traditae sunt: quo facto confestim emptor dominium et possessionem adipiscitur, etsi non aperuerit horrea*; ib. 1 78. § 1; XIX. 1. 1 3 pr. &c.; XLI. 2. 1 21; 1 33; 1 48. So frequently with *uacua* (to secure exclusive possession); XIX. 1. 1 2. § 1; 1 3. § 1 sqq.

That (legal) possession could be acquired through a slave by the slave's owner was beyond doubt (Gai. II. 89; D. XLI. 2. 1 1. § 5). Possession could also be acquired by the apparent owner of a slave, though the slave was really some one's else, or even not a slave, but a freeman, provided only the apparent owner was acting *bona fide*. And possession so acquired in due time ripened into ownership (Gai. II. 94; D. ib. § 6). But whether in the same way possession could be acquired by a fructuary through a slave, of which he had the usufruct, was in Gaius' time doubtful. *De illo quaeritur, an per eum seruum in quo usumfructum*

*habemus, possidere aliquam rem et usucapere possimus, quia ipsum non possidemus* (Gai. ib. 94). Ulpian however had no doubt: *Per eum in quo usumfructum habemus possidere possumus, sicut ex operis suis adquirere nobis solet; nec ad rem pertinet, quod ipsum non possidemus: nam nec filium* (D. ib. § 8). The doubt expressed by Gaius was omitted by Justinian when transferring this part of Gaius to his Digest (XLI. 1. 1 10). But this doubt was not solitary. That a man could acquire possession through a child *in potestate* was clear: but the family included also persons *in manu* (a wife) and *in mancipio*. In Gaius' time there was a doubt about these (Gai. II. 90). The relations having become obsolete, Justinian had no need to solve this question.

The question was specially important before Justinian, because legal possession was the condition of usucapion; and usucapion was much relied on to heal defects in conveyance, such as transfer by mere delivery of what ought to be transferred by mancipation. On mancipation being abolished the defect of title in the transferor was the chief thing which might interfere with an ordinary transfer of property. But the full length of possession required for the interdicts contributed to the importance of the question of possession.

**si uero heres institutus sit uel legatum acceperit]** A slave could acquire nothing as his own in the eye of the law. He could not hold as owner. If a slave was made heir by his owner's will, the institution was null, unless he was made free also. Otherwise both slave and inheritance would be without an owner. If another person's slave was made heir, the master could direct him to enter, and on the slave's entering became himself at once heir through the instrumentality of the slave (D. XXIX. 2. 1 79). Similarly a legacy to another man's slave was in effect a legacy to the slave's master. But if the slave was in usufruct, is the usufructuary or the bare owner to benefit? Most lawyers answered broadly, that entrance on an inheritance or acceptance of a legacy was not within either of the categories which entitled the usufructuary to acquire through the slave, and that consequently the owner, not the fructuary, took the inheritance or legacy. So Gaius II. 91 (=D. XLI. 1. 1 10. § 3; Just. II. 9. § 4); Ulpian D. XXIX. 2. 1 25 pr.; cf. *Reg.* XIX. 20; Julian (D. XXIX. 2. 1 45. § 3) and Paulus (D. XLI. 1. 1 47). Both these last give the reason that *aditio hereditatis non est in opera serui* (D. XXIX. 2. 1 45 pr.). A formal legal act of entry on an inheritance cannot be regarded as a slave's service. But Julian in the same passage (§ 4) throws out the suggestion that, if, as some asserted, and he admits to be possible, a *bona fide* possessor of a freeman in the guise of a slave can direct him to enter on an inheritance to which he has been instituted on the supposed master's account, the reason is that such an acquisition must be deemed to be *ex re domini*. How it can be so is not clear. It is not because the intention of the testator is conceived as already giving the master an equitable title: for that would imply an acquisition of what is already (equitably) my



own. I suppose Julian meant that some expenditure on the part of the master must be presumed to have in some way been necessary for the entry of the slave on the inheritance. This is possibly the ground on which Labeo proceeded in our passage. But it is more likely that Labeo followed what was reasonable, without caring whether the act could be brought under the old limitation *ex operis suis uel ex re domini*. Labeo's opinion was evidently adopted by Justinian (see l 22). It is confirmed by Bas. But there certainly is a contradiction in words between l 21, l 22 of our title and the passages of Julian (D. xxix. l. c.) and Paulus (D. xli. l. c.). Schrader (ad *Inst.* II. 9. § 4) reconciles them by regarding these last as the general rule and our passage as giving the exceptions. Pomponius (in D. xli. l. 1 19) in discussing acquisition through a freeman, *qui bona fide mihi seruit*, says that he does not acquire an inheritance for me, but that if the intention of the testator is clear, the inheritance should be restored to me. See also note on l 25. § 3 *ipsi adquirere* (p. 169) for a like view taken by Pomponius in a case of stipulation. Such a solution, viz. acquisition by the owner with an obligation to restore to the fructuary would meet the difficulty in our passage, were it not for the positive words of l 22, *ipsi adquiret*.

**cius gratia**] 'for whose sake'. Unless the slave were intended also to benefit in some way by the inheritance or legacy, one does not see why the inheritance should not have been directly given to the fructuary or bare proprietor. Pernice (*Labeo* I. p. 140) suggests that it may have been done to institute another's posthumous child as heir; cf. D. xxviii. 5. l 65 (64). Possibly the convenience of a master (or fructuary) absent in the provinces may have been consulted by appointing a slave who was actually present, or could without difficulty be sent there, to enter on the inheritance. This however would not apply to the case of legacies.

**l 22. in omnibus istis**] 'in all these cases of acquisition', e.g. inheritance, legacy, gift.

**quid fieri oporteat**] 'what should be done', i.e. who is to be held entitled.

**ipsi adquiret**] i.e. *fructuario*. So also below *dicendum est ipsi adquiri*. It is best translated by an emphatic 'for him', i.e. the man just named. So in l 25. § 3 *Scribit eum qui ex re fructuarii stipuletur nominatim proprietario uel iussu eius, ipsi adquirere, ipsi* is the proprietary and relates to *eius*; ib. § 4; xxiii. 3. l 10. § 6; xxiv. 3. l 64. § 4.

**unde cognitum, &c.**] 'how', or 'through whose merit, the donor or testator (has known, i.e.) came to know the slave'.

**adquiretur domino**] The *dominus* is the same as the *proprietary*, but the term *dominus* is used because the general rule, that a slave's gains are the gains of his master, is now applicable without qualification.

**condicionis implendae causa**] e.g. if some one received a benefit under a will on condition, that he gave £100 to a slave whose services

I have as usufructuary. If it be shewn that I was intended to be benefited, the £100 when paid to the slave would come to me, not to the slave's owner.

A gift of some kind as a condition of benefit under a will is often mentioned, as imposed upon the heir, or a legatee, or a slave to whom liberty was granted (e.g. D. xxxv. 1. 1 44; 2. 1 76 pr.; xxxix. 6. 1 36; 1 38). Such a gift received came under the category of *mortis causa capio*, which was not identical with, but inclusive of, *mortis causa donatio* (D. xxxix. 6. 1 31).

**nam et in m. c. donat.]** The line of argument implied in *nam* is something of this kind. 'This is true of a thing given *inter vivos*, and it is true also of a gift in view of death (*donatio mortis causa*); therefore we may infer it to be true also of those cases of gift which have analogies to both'. See also preceding note.

A *mortis causa donatio* was a gift made usually, but not necessarily, in apprehension of some impending danger to life, e.g. by a man dangerously ill, or about to take a dangerous journey. The essential characteristic was that it should take effect only on the giver's death, and, if the person to whom it was given died first, should be null. Marcian defines it epigrammatically: *Mortis causa donatio est, cum quis (magis) habere se vult quam eum cui donat, magisque eum cui donat quam heredem suum* (D. xxxix. 6. 1 1). The gift could be made in any suitable form (manicipation, tradition, &c.) and the thing given might either remain with the donor, or be handed over to the donee, subject to be reclaimed by the donor, either if the donee died first, or (provided such was the understanding), if the donor changed his mind (ib. 1 13; 1 29, &c.). In some respects a *m. c. donatio* resembled a legacy, and hence restrictions imposed on the power of giving and receiving legacies were extended to gifts in view of death (cf. Gai. ii. 225, 226; D. xxxix. 6. 1 42. § 1). In case of the donor's insolvency, or of a will being set aside in favour of parents or children, such gifts were invalidated (D. ib. 1 17; xxxvii. 5. 1 3 pr.). Ulpian's broad statement in D. xxxix. 6. 1 37 probably related only to the application of the *lex Papia Poppaea*, and was made general by Justinian (*Inst.* ii. 7. § 1).

1 23. **stipulando]** After treating of the acquisition of things through a slave, Ulpian proceeds to the acquisition of obligations and the like. By a stipulation a slave acquires for a fructuary a valid obligation upon which he can sue; by a bargain or informal agreement he acquires, not a right to sue, but a plea capable of defeating another's suit; by obtaining a formal release (*acceptum rogando*), he acquires for a fructuary the extinction of a subsisting obligation.

**paciscendo]** 'by making a bargain'. A *pactum* was a verbal agreement not made in solemn form (*stipulatio*). If it was made in immediate connexion with a definite legal contract, e.g. a loan, deposit, pledge, sale, hiring, partnership, commission or the like, it was regarded as defining the

precise terms of the business (see note on l 3. pr. p. 37), and thus became a valid ground of the obligation. *Solemus dicere pacta conuenta inesse bonae fidei iudiciis: ea pacta insunt quae legem contractui dant* (D. II. 14. l 7. § 5). But if it was subsequent at some interval or stood by itself, independent of any other transaction, it was held not to create an obligation and consequently gave no right to sue on it; but, as an agreement made in good faith, the Praetor protected it, and so far enforced it as to allow it to be a valid plea (*exceptio*) against any one suing in spite of it (D. II. 14. l 7. § 7 sqq.). The title *de pactis* in the Digest is placed in the part relating to procedure and hence is mainly occupied with agreements *not* to sue, and some introductory matter of a more general kind. Hence the doctrine is appropriate: *nuda pactio obligationem non parit, sed parit exceptionem* (ib.). Some pacts, however, especially *constitutum debiti* (D. XIII. 5; Cod. IV. 18) i.e. an arrangement for the payment by the debtor or other of an existing debt, were allowed to give a right of suing.

**idemque]** 'and Julian also writes'.

**acceptum rogauerit]** Corresponding to the *stipulatio*, i.e. the solemn verbal contract made by question and answer which created an obligation, was a solemn verbal form of release from the same, made also by question and answer, here as in other cases the question being put by the party to be benefited, the answer by the party consenting to accept the burden or waive the benefit. The debtor seeking a release *acceptum rogauit*; the creditor granting a release *acceptum fecit*. The debtor said *Quod ego tibi promisi habesne acceptum?* The creditor answered *Habeo* (Gai. III. 169) or the forms might be *Accepta facis decem? Facio* (D. XLVI. 4. l 7). This was called *acceptilatio*, a term clearly borrowed from bookkeeping, and in this connexion we find *acceptum (accepto) ferre* used in D. XXI. 2. l 4. § 1; XXXII. l 29. § 2; 191. § 3; and in metaphorical use 'to credit with', in Val. Max. II. 7. Ext. 2; VIII. 2. § 3; Sen. Ep. 78. § 3. But *acceptum (accepto) facere* or *fieri*, in the sense of putting an end to an obligation, is found in Cic. Verr. III. 60. § 139; Plin. Ep. II. 4; VI. 34; and frequently in the law writers, e.g. Gai. III. 215; and indiscriminately with *acc. ferre* in Dig. XLVI. 4. The use of *accepto* (predicative dative?) is found only in the law writers.

An *acceptilatio* was of itself a complete release and required no payment or other satisfaction of the debt: *Velut soluisse uidetur is qui acceptilatione solutus est* (D. ib. l 16). Any obligation, whether due now or not till some future time, may be extinguished by this form, by first being brought into a stipulation (ib. l 8. § 3; l 12). At one time it was doubted whether part of an obligation could be thus released (Gai. III. 172), but this doubt was removed afterwards. The obligation must however be of its own nature divisible: thus a release of part of a usufruct is valid in the sense that the usufruct of part of the estate is released, but a release of part of a right of road is not valid (D. ib. l 13. § 1). The release itself must be present and absolute, not future nor conditional (l 4; l 5).



With our present passage may be compared D. ib. l 11. *Species adquirendi est liberare dominum obligatione: et ideo fructuarius quoque servus liberare, acceptum rogando, fructuarium potest, quia ex re eius videtur ei adquirere: sed et si usum tantum habemus, idem fiet.*

**liberationem]** 'freedom from an obligation'. This is the regular use of the word in the Digest. So also *liberare*. Cf. D. l. 16. l 47 *Liberationis verbum eandem vim habet quam solutionis*; IV. 2. 19. § 4; XLVI. 3 *passim*.

**ei p̄rere]** 'that the slave obtains for the fructuary (*ei*) freedom from the obligation'. So *parere actionem*, D. XX. 1. l 17; *obligationem*, XLV. 1. l 108; *exceptionem*, XLIV. 2. l 6; &c.

**cogendum]** 'that he may be compelled' = *cogi posse*. Very common. Both expressions occur in the same sense and application in D. XXXVI. 1. l 17 (16) *pr*. For this use of the gerundive, see *Lat. Gr.* § 1404 and *Pref.* p. lxxvii.

**operari]** 'to work'. Plin. XI. 21 *Quibus est carum* ('bees') *adulescentia, ad opera exeunt, seniores intus operantur*; D. XXVIII. 5. l 35. § 3; XI. 7. l 3. § 8 *Quod si prohibeatur operari, non fore liberum, quia operari domino debet* ('he owes his master work', and consequently cannot claim to be allowed to make wages by working for another); *sane si testator vel ex operis ut det iussit, prohibitum operari ad libertatem peruenturum non dubito*. The nature of the work demanded from a slave would of course depend on the qualifications and habits of the slave. See above l 15. § 1.

**modicam castigationem]** See above l 15. § 3; l 17. § 1. Cf. D. II. 1. l 12 *Magistratibus municipalibus supplicium a servo sumere non licet, modica autem castigatio eis non est deneganda*. *Castigare* is a general word, cf. Cic. *T. D.* III. 27. § 64 *Pueros matres et magistri castigare etiam solent, nec verbis solum, sed etiam verberibus, si quid in domestico luctu hilarius ab iis factum est aut dictum, plorare cogunt*. But beating is the regular meaning, cf. D. XLVII. 10. l 15. § 30; &c.

**torqueat, &c.]** Cf. Paul. *Sent.* III. 6. § 23 *Servos neque torquere neque flagellis cadere neque in eum casum facto suo perducere usufructuarius potest, quo deteriores fiant*. See l 15. § 3; l 17. § 1; l 66. On putting slaves to torture in order to obtain evidence, see D. XLVIII. 18; Paul. *Sent.* v. 14—16.

**l 24.** In this and the beginning of the next law we have mention made of two modes by which a man can make a gift to another through the medium of a slave, of which the donee has the usufruct. In this law the slave stipulates, the donor promises; in the next the donor stipulates for himself or for the slave.

**sponderit]** This was the technical word used by Romans in giving a solemn verbal promise. The stipulator said *dari spondes?* (*spondesne?*); the promiser answered *spondeo*. But other words were used by Romans with the same import in dealings with either Romans or foreigners, e. g. *promittis?* *Promitto*. *Facies?* *facio*, &c. Cf. Gai. III. 92, 93 *Hæc quidem verborum obligatio 'dari spondes? spondeo' propria civium Romanorum est*;

*cetera uero iuris gentium sunt*; Cic. *Caecin.* 3. § 7 *Si quis, quod spopondit, qua in re uerbo se obligauit uno, si id non facit, maturo iudicio sine ulla religione iudicis condemnatur*; *Rosc. Am.* 5. § 13 *Stipulatus es—ubi, quo die, quo tempore, quo praesente? quis spopondisse me dicit?*

**in quem usumfructum habet**] sc. *usufructuarius*. Gaius has *in quo usumfr. habemus*, &c. So II. 86; 91; 94; III. 165; Ulp. XIX. 21. On the other hand Gaius has the accusative of the person over whom power is exerciseable, e. g. I. 55 *Fere nulli alii sunt homines, qui talem in filios suos habent potestatem, qualem nos habemus*. Cf. D. I. 18. § 3.

**ei**] sc. *fructuario*.

**talis**] A slave of whom he has the usufruct. It must be shewn, that it was to benefit the usufructuary that the donor promised. See above, I 22 pr., and I 25 pr.

**I 25 pr. si quid stipuletur**, &c.] ‘moreover if he stipulate for anything for himself or for Stichus, a slave in usufruct, with the view of making a gift, wishing thereby payment to the fructuary, we must say that if the debt is paid to the slave, the fructuary acquires it’.

The inferior mss have *si quis* which is attractive. But there is no necessity for it. The subject of *stipuletur* may well be ‘*quis*’ of I 24.

**fructuario**] adjective with *seruo*, as in I 22 *seruus fructuarius consequatur*, and elsewhere.

**dum uult**] See *Lat. Gr.* 1665. For *uult praestitum* ‘wishes performance made’, *Lat. Gr.* § 1400.

**praestitum**] *Praestare* is ‘to take upon oneself’, ‘to be answerable for’, ‘to furnish’ or ‘supply’, ‘to warrant’. Its principal uses will be seen in the following passages. Gai. IV. 131 *Saepe ex una eademque obligatione aliquid iam praestari oportet, aliquid in futura praestatione est*, ‘something has to be furnished at once, something not till a future time’; see below, I 50 *usumfructum praestare*; Gai. III. 137 *In his contractibus (i. e. ex consensu) alter alteri obligatur de eo, quod alterum alteri ex bono et aequo praestare oportet*, D. XXXVII. 9. I 1. § 19 *Curator constituendus est qui cibum, potum, uestitum, tectum mulieri praestet*; XXX. I 82. § 5 *Necesse habet alteri actiones suas, alteri litis aestimationem praestare*, i. e. to allow one to sue in his name, and to furnish the other with a sum of money equivalent to that which would be recovered in the action; XVIII. I. I 66 pr. *In uendendo fundo quaedam etiam si non dicantur praestanda sunt, ueluti ne fundus euincatur* ‘warranted against eviction’ (cf. Cic. *Off.* III. 13. § 55); XIII. 6. I 5. § 2 *In contractibus interdum dolum solum, interdum et culpam praestamus*; § 3 *In commodato Q. Mucius existimat et culpam praestandum et diligentiam, et si forte res aestimata data sit, omne periculum praestandum ab eo qui aestimationem se praestaturum recepit*, where ‘to be answerable for’ is a translation suiting both ‘fraud’ and ‘fault’ (which should be avoided) and *diligentiam* (which should be shewn). In Gai. IV. 2 *Cum intendimus dare, facere, praestare, oportere* Savigny takes *dare* to relate to making over property or servitudes, *facere* to any other contractual per-

formance, *praestare* to duties resulting from torts (*System* v. p. 598 sqq.; *Obligat.* i. § 28. p. 300). Wächter, *Erörter.* ii. p. 69, and Böcking, *Pand.* i. p. 289, refer *praestare* specially to obligations arising from consensual contracts. *Dare* and *facere* are regularly used in formulae: *praestare*, as Savigny remarks, is not found in the *intentio* of any of the formulae preserved to us.

**si ei soluatur, fructuario adquiri.]** It was an essential principle of a stipulation that it was valid only, if you stipulated for something to be done or given to yourself (D. l. 17. l 73. § 4). The exceptions to this rule, more apparent than real, were these:

1. Persons under the same power could stipulate in favour of their master or of each other; and the master could stipulate in favour of them. In all cases the benefit came directly to the master. D. XLV. l. 1 38 *Alteri stipulari nemo potest praeterquam si servus domino, filius patri stipuletur: inuentae sunt enim huiusmodi obligationes ad hoc, ut unusquisque sibi adquirat quod sua interest; ceterum ut alii detur nihil interest mea; ib. § 6; l 39; l 40; l 45 pr. Quodcunque stipulatur is, qui in alterius potestate est, pro eo habetur ac si ipse esset stipulatus; l 130.*

2. A person might stipulate for something in favour of another if it was for his own interest that that other should be so benefited, e.g. for payment to be made on his behalf to a creditor, or if a retiring guardian stipulates from his co-guardians for the proper administration of the ward's property; or if one under an obligation stipulates with a third person to perform the covenants for him; or if a man stipulates for the payment &c. to his own procurator (D. ib. l 38. §§ 20—23).

3. A man may stipulate in favour of himself and his heir, e.g. for a right of road. The heir can sue on the stipulation as well as himself. There is here a continuity of person. (D. ib. §§ 12—15 *Suae personae adiungere quis heredis personam potest.*)

4. A man may stipulate in favour of himself and an outsider. In this case all agreed that the outsider got nothing; but there was, as Gaius tells us (ii. 103), a doubt whether the stipulator could sue for the whole or only for a half. The latter opinion prevailed (Pompon. D. XLV. l. 1 110 pr. *Si mihi et Titio, in cuius potestate non sim, stipuler decem, non tota decem sed sola quinque mihi debentur: pars enim aliena deducitur, ut quod extraneo inutiliter stipulatus sum, non augeat meam partem.*)

5. A man may stipulate in favour of himself, or an outsider; The outsider acquired no rights, but payment to him was good payment and freed the promiser. In fact it was taken that the outsider was put into the stipulation for the greater convenience of payment, the real interest being that of the stipulator, who however thus authorised the outsider to give a receipt (D. XLVI. 3. l 10 *Quod stipulatus ita sum 'mihi aut Titio', Titius nec petere nec novare nec acceptum facere potest, tantumque ei solui potest; XLV. l. 1 56. § 2 (Julian) Qui sibi aut filio suo dari stipulatur, manifeste personam filii in hoc complectitur ut ei recte soluatur: neque interest*



*sibi aut extraneo cuilibet, an sibi aut filio suo quis stipuletur: quare uel manenti in potestate uel emancipato filio recte soluitur*). See generally Gai. II. 103; D. XLV. 1. 1 141; Just. III. 19. § 4. It was however possible to get over the rule by stipulating, not directly in favour of a third person, but for a penalty to be paid to yourself if the desired payment or performance in favour of the third person was not made (D. XLV. 1. 138. § 17).

In the case mentioned in our passage the usual intention of stipulating for oneself or another is negatived by the words *donandi causa*. But the result is not altered. Whether the person eventually to be benefited by the matter stipulated for be the stipulator or the slave or the fructuary, the stipulator only can sue. Payment to either stipulator or slave is good; but payment to the fructuary is not good, cf. D. XLVI. 3. 1 9 pr. Payment to the slave however is in effect payment to the fructuary.

§ 1. **in pendenti est**] See note on l 12. § 5 (p. 96). The same case is put and expression used in D. XLI. 1. 1 43. § 2 (see next note but one).

**fecit satis**] See above on l 12. § 5 *satisfacto* (p. 96).

**interim cuius sit**] For the purpose of making a contract of purchase and sale, intention to transfer the property, and agreement on the thing and on the price, is sufficient. Each party has then a right of action on the purchase or sale (D. XVIII. 1. 1 2. § 1; 1 9, &c.). But this agreement has no effect on the ownership of the thing. In order that the property may pass, delivery must be made on the one side either actually or constructively (D. XLI. 1. 1 9. §§ 3—8; Cod. II. 3. 1 20), and on the other the price must be paid, or a pledge or security given, or credit allowed (D. XVIII. 1. 1 19; 1 53). But to whom has the property passed in this case? The slave can acquire, either for the fructuary or for the bare owner. For the fructuary in the case put, only if the money comes from him: for the owner, both if the money come from him, and, though it come from the fructuary or elsewhere, if the slave expressly name the owner in making his bargain, or make the bargain by his bidding (below § 3; D. XLV. 3. 1 39). Meantime, till the money is paid, according to Julian the ownership of the thing delivered to the slave is in suspense; and consequently no one could bring an action, if it were lost or stolen or damaged (cf. l 12. § 5; D. XXI. 1. 1 43. § 10).

It is not necessary that the slave should have taken for the payment the owner's or the fructuary's money in the non-legal sense of the term. The money may have come from the slave's *peculium*, i.e. from what was practically recognised as the slave's private property, procured probably by gradual savings. And a slave in usufruct might have two *peculia*, one derived ultimately from the bare owner, the other from the fructuary, and respectively belonging to each. This is supposed in D. XLI. 1. 1 43. § 2 where Gaius after putting the case given in the text goes on, *Et cum ex peculio, quod ad fructuarium pertinet, soluerit, intelligitur fructuarii homo fuisse: cum uero ex eo peculio, quod proprietarium sequitur, soluerit, proprietarii ex post facto fuisse uidetur*. See also xv. 1. 1 19.

**dominium eius]** 'the ownership of it', i.e. the thing bought and delivered.

**retro fructuarii fuisse]** If the payment came from the fructuary's goods, the thing (or the property in the thing) belonged to the fructuary from the first, i.e. from the time of the delivery. *Retro* 'dating backwards' is often used of an extension into the past of that which is ascertained only at the present. Cf. D. VIII. 4. l 18 *Cum postremus* (last of several owners) *cedat (servitutem), non retro adquiri servitus videtur, sed perinde habetur, atque si cum postremus cedat omnes cessissent*; IX. 2. l 35; XXX. l 44 pr.; § 1; &c.; XXXIV. 5. l 15 (16) *Quaedam sunt, in quibus res dubia est, sed ex post facto retro ducitur et apparet quid actum est.*

**idemque est si, &c.]** 'and the same is the result, if' &c. This case of a loan of money, with a stipulation for repayment, is also put in D. XLV. 3. l 18 fin. For *idem est, &c.*, cf. D. XII. 1. l 18. § 1; &c.

**ergo ostendimus, &c.]** 'we have shewn then that the ownership is in suspense, till the price is counted out: but what are we to say, if', &c. *Ergo ostendimus* is merely to form a base for putting the difficulty arising from the loss of the usufruct. For *ostendimus* cf. D. XXVII. 7. l 4 pr.

**si amisso usufr.]** 'if before the price be counted out, the usufruct be lost' e.g. by death or *capitis deminutio*.

**adhuc interesse unde, &c.]** 'that it still turns on the point whence came the price that was counted out'. For *adhuc* in this sense of continued affirmation, almost 'notwithstanding that', cf. Gai. II. 84 *Sed tamen si ex ea pecunia locupletior factus sit et adhuc petat*; D. XXXVI. 4. l 1 pr.; XXXVII. 4. l 8. § 5. In Gai. III. 85; 176 it denotes actual continuance of the state spoken of: in III. 102; 152; 180 it introduces an additional case of invalidity, dissolution, &c.: all nearly allied uses. For *interesse*, cf. *intererit cuius priores nummos soluat* (in this section); D. XLI. 2. l 39 *interesse puto, qua mente apud sequestrum deponitur res.*

**humanior est]** 'is kinder', i.e. to the usufructuary, whose money has been spent. If the opinion of Marcellus had prevailed, still the fructuary would have had a claim (*condictio indebiti*) against the proprietor (D. XIX. 1. l 24; cf. XLV. 3. l 39; XV. 1. l 19. § 2). But if the money had been taken, not from the fructuary's own moneys, but, from that part of the slave's *peculium* which technically belonged to the fructuary, the thing purchased would be in the slave's *peculium*, and, I suppose, would in practice continue, notwithstanding the cessation of the usufruct, to be with the slave though merged with his other *peculium*. In that case the fructuary would not in practice be entitled to recover. For *humanior* cf. D. XIII. 5. l 24; XXVIII. 5. l 85 (84); XXXIV. 5. l 10 (11) § 1 *in ambiguis rebus humaniorem sententiam sequi oportet.*

**pro rata pretii soluti]** 'according to the proportion in which each estate contributed to the price paid', e.g. if 15,000 sesterces from the fructuary and 5000 sesterces from the proprietary, the fructuary will be owner of three fourths of the thing acquired, the proprietary of the remaining fourth. *Pro rata* occurs in Liv. XLV. 40. § 5; the full phrase *pro rata*

*parte* in Cic. *Tusc. D.* I. 39. § 94; *pro rata portione* in Plin. *H. N.* XI. § 40; D. xxxv. 2. l 73. § 5; xxxvi. 1. l 77 (75) pr. The inferior MSS add *portione* in our passage. *Pro rata* is frequent in the Digest, e.g. xiv. 4. l 5. § 19; xi. 7. l 27 pr. (its synonym *pro portione* is in l 22). *Ratus* in such expressions means 'counted', 'reckoned'; hence *ratam rem habere* 'to count' or 'allow (=ratify) a matter'; *irritum testamentum* 'a will not reckoned' or 'allowed'.

**si forte simul soluerit ex re utr.** 'if he made a payment in full at the same time from the estate of each', i.e. pays a debt of 10,000 sesterces with 10,000 sesterces from one and another 10,000 sesterces from the other.

**pretii nomine** i.e. 'professedly as the price of the thing', and consequently with the intention of making over to the seller the property in the coin, and acquiring the property in the thing. Cf. Gai. III. 141.

**cui magis** 'for which rather than the other'. One would have expected *utri...adquirat*.

**intererit cuius priores, &c.** 'it will turn on the point whose moneys he pays first', i.e. whether the coins which he actually uses in payment are the fructuary's or the proprietary's. The payment is accomplished as soon as ten thousand sesterces are paid: if the sesterces were the fructuary's, the property in the thing will belong to him; if the proprietary's, then to him.

**undicabit** 'he will claim the coins as being still his property; if however they be confused with others, or spent, he will sue for the amount, not for the specific coins'.

**ad condict. pertinent** 'they are matter for a conduction' (not for a vindication).

**simul in sacculo soluit** i.e. if he puts the 20,000 sesterces into a bag and hands over the bag as the price, it is impossible to say which are paid first. As more than the correct amount is thus paid, the slave cannot be therein acting as the agent of the proprietary or fructuary, and therefore can have no authority to convey the property in the moneys. Had more than the proper amount been paid by the owner of the moneys, he would have had a right to recover the excess. If the payment was in such a form that the excess did not admit of ascertainment and separation, the whole could be recovered, e.g. if a man in payment of a debt of £100 conveyed an estate worth £200. But with money and other things which can be weighed and numbered, the excess can be fairly ascertained and separated (D. XII. 6. l 26. §§ 4—6; L. 17. l 84 *Cum amplius solutum est quam debebatur, cuius pars non invenitur quae repeti possit, totum esse indebitum intellegitur, manente pristina obligatione*). In *sacculo dare* is contrasted with *numerare* in D. XL. 7. l 3. § 6.

**nihil fecit accipientis** 'he conveyed the property in nothing to the receiver'; i.e. the property in all the money in the bag, notwithstanding the delivery, still remained where it was before: nothing passed to the



receiver. The expression is common, e.g. Gai. II. 81 *Si quando mulier mutuum pecuniam alicui sine tutoris auctoritate dederit, facit eam accipientis*; D. XLIV. 7. 1 1. § 2; &c.

**plus pretium**] 'more than the price'. This use of *plus* instead of *plusquam* is common with numerals (*Lat. Gr.* 1273), but not with words like *pretium*. So that it is better perhaps to take *plus* here as an adjective and translate the phrase 'an excessive price'. For *pluris pretii* is occasionally found in this sense in classical writers, and in D. XII. 6. 1 26 we have *maioris pretii res* in § 4 corresponding to *oleum pluris pretii* in § 5. Cf. *Lat. Gr.* § 1187 and Pref. to Vol. II. p. lix.

**soluit seruus**] The stress of the sentence is on *seruus*. See note above on *simul in sacculo*.

§ 2. **si operas suas...locauerit**] Cf. below l 26. Papinian puts the same case in D. XLV. 3. 1 18. § 3.

**in annos singulos certum aliquid**] 'a fixed yearly sum'. As in the case of sales so in that of letting, the contracts so called were not concluded unless the price or hire was definitely agreed. But was it required that the agreement should actually fix the price or hire at the time, or fix the person who should fix it? Labeo and Cassius held the former to be required: others thought the latter sufficient. Justinian eventually decided for the latter (altering Gaius in D. XIX. 2. 1 25 pr. accordingly) provided the person so agreed on did actually fix the price or hire: if he did not the agreement was null (Gai. III. 140—143; Just. III. 23. § 1; 24. § 1). With the language in the text compare Gai. III. 142 *Nisi merces certa statuta sit, non uidetur locatio et conductio contrahi*; D. XXIV. 1. 1 52 *Locatio sine mercede certa contrahi non potest*. Both speak of *merces*, and *merces* like *pretium*, as is generally held, must be in money. This is supposed to follow from the following passages, D. XVI. 3. 1 1. § 9; XVII. 1. 1 1. § 4; XIX. 5. 1 5. § 2; *Inst.* III. 24. § 2; Theophil. *Inst.* III. 24 pr. καὶ ὥσπερ εἰρήκαμεν ἐκεῖ, κέρτον (certum) καὶ ἐν ἀργυρίῳ ὀφείλειν εἶναι τὸ τίμημα, οὕτω καὶ τὸ μίσθωμα κέρτον καὶ ἐν ἀργυρίῳ εἶναι δεῖ; ib. § 2. Ordinary language however admitted certainly of the *merces* for a farm being in a quantity or proportion of the produce, e.g. Liv. XXVII. 3 *Capuae Flaccus bonis principum uendendis, agro qui publicatus erat locando (locauit autem omnem frumento) tempus terit*; Plin. *Ep.* IX. 37 *Medendi una ratio si (praedia) non nummo sed partibus locem*. And this was evidently recognised by the lawyers also D. XIX. 2. 1 25. § 6; XLVII. 2. 1 26. § 1; Cod. IV. 65. 1 8 *Licet certis annuis quantitatibus fundum conduxeris*, &c.; 1 21 *Si olei certa ponderatione fructus anni locasti*. An arrangement for taking part of the rent in kind is mentioned in D. XIX. 2. 1 19. § 3. This exception from the general rule is generally admitted (see the discussion in Glück XVII. p. 327 sqq.), but in truth it is only Theophilus who definitely lays down the rule. In the other passages it may fairly be held that the question of measurable produce was not present to the writers. Compensation for the use of a thing, if agreed to be made in some other form than money or measurable produce

of the thing, was no doubt protected, not by the *actio locati conducti*, but by an *actio in factum* or a *condictio* (D. XIX. 4; 5).

*Certum aliquid* is a wide expression. Cf. D. XII. 1. 16 (Paulus) *Certum est cuius species uel quantitas quae in obligatione uersatur aut nomine suo aut ea demonstratione, quae nominis uice fungitur, qualis quantaque sit ostenditur*. The *lex Silia* which introduced an improved procedure (*condictio*) for recovering *certam pecuniam* was followed by the *lex Calpurnia* which authorised the same procedure for *omnem certam rem* (Gai. IV. 19): and Gaius in D. XLV. 1. 174 gives a wide definition: *Stipulationum quaedam certae sunt, quaedam incertae. Certum est quod ex ipsa pronuntiatione apparet, quid quale quantumque sit, ut ecce aurei decem, fundus Tusculanus, homo Stichus, tritici Africi optimi modii centum, uini Campani optimi amphorae centum*. Cf. ib. 175.

In our text both general probabilities and the use of *locauerit* make it reasonable to suppose that the hire was in money. But the certainty is the important point, where the right to receive it shifts, and there is no privity between the parties successively entitled.

**eorum annorum stipulatio**] A short expression for 'the right to sue for the hire of those years'. The stipulation is treated as if divisible into a stipulation for each year, just as a legacy *in singulos annos* was regarded as a series of legacies, and a usufruct *in sing. annos* as a series of usufructs (D. XLV. 1. 154; XXXIII. 1. 111; VII. 4. 12. § 1).

**quibus us. fr. mansit**] 'for which the usufruct lasted'. The ablative is used in post-Augustan writers frequently of the duration of time. The case assumes the usufruct to lapse during the continuance of the lease. See on l 26.

**semel adquisita fructuario**] 'having been once acquired by the fructuary' (*fructuario* is the dative; cf. *Lat. Gr.* § 1146). One could not stipulate for another (above, p. 157), therefore the stipulation could not have been made by the fructuary, nor by the fructuary's slave acting for the fructuary, in favour of the proprietary. But, once made, it in this case passed on with the complete exercise of ownership of the slave.

For *semel* 'once', as opposed to 'not yet' or 'not at all', compare *semel adquisita* in the next line; D. L. 17. 1 139 *Omnes actiones quae morte aut tempore pereunt, semel inclusae iudicio, saluae permanent*; XXXVI. 1. 165 (63). § 2; 2. 12 fin.; Gai. II. 257; &c.

**quamuis non soleat**] Ulpian points out that this is an exception to the general rule, which was that a stipulation, like any other obligation, was a personal link between two definite persons, and could be transferred from one of those persons to another only in connexion with a transfer of the whole legal position of that person. As a separate claim a stipulation could not be transferred, but a new stipulation could be entered into between *B* and *C* which would take the place of that between *A* and *B* (Gai. III. 176; D. XLVI. 2. 11 &c.). The difference is best illustrated by bills of exchange. The indorsing of a bill of exchange is a transfer of the

right to sue upon the bill from the drawer or other payee to the indorsee or to bearer and may be done without consulting the drawee. Such a transfer was not allowed in Roman law. But if instead of indorsing, the drawer got the drawee to accept another bill drawn by a third party, and this operated as an annulment of the first bill, we should have a procedure analogous to that of the Roman novation.

There were however some occasions or modes by which a third party stepped into the legal position of another, as a whole, including its rights and its obligations. The two usual and, in the later law, almost the only occasions were inheritance and adoption. (See Just. II. 9. § 6.) Gaius (II. 98) enumerates five such occasions *Si cui heredes facti sumus, siue cuius bonorum possessionem petierimus, siue cuius bona emerimus, siue quem adoptauerimus, siue quam in manum ut uxorem receperimus, eius res ad nos transeunt*, in which place *res* includes all rights and liabilities of the predecessor. Of these the *bonorum possessor* is in our text included under the word *heres* (D. XXXVII. 1. l 2; L. 16. l 170); the *emptio bonorum*, or purchase of the whole estate of an insolvent, became obsolete with the change of judicial procedure (*Inst.* III. 12 pr.), and the *conuentio in manum*, or subjection of a woman to the full power of her husband, as if he were her father, went out of use also. It was connected with three forms of marriage, *usus, confarreatio, coemptio* (Gai. I. 110). *Usus* was obsolete in Gaius' time (ib. 111). *Confarreatio* is spoken of by Tac. (*An.* IV. 16) as rarely occurring, and in Gaius' time was used only in connexion with certain priesthoods (ib. 112), and passed away at latest with the abolition of the old Roman priesthoods by Theodosius, A.D. 394. *Coemptio* existed in Gaius' time and was probably meant by Papinian (*Coll.* IV. 7) and Paulus (ib. IV. 2. § 2), in speaking of *in manum conuenire*. By Servius (ad *Georg.* I. 31) and Boethius (ad Cic. *Top.* 3) it is spoken of only as in use in former times. It had expired before Justinian. Cf. Rossbach's *Ehe* p. 57; Kuntze, *Cursus*<sup>2</sup>, § 773; § 976.

A succession somewhat analogous to that of a *bonorum emptor* or *possessor* was created by a constitution of M. Antoninus in order to secure effect being given to manumission of slaves by will. If no one who had a right or claim by law to enter on the inheritance was willing to do so, the estate of the testator might be assigned to a slave or stranger who gave good security for the payment of the debts. He would have, if he desired it, the rights of patron to the emancipated slaves, and guardianships (D. XL. 5. l 2—l 4; Just. III. 11; Cod. VII. 2. l 6; l 15).

**non soletat** ['does not frequently' or 'as a rule'; the case mentioned in the text being an exception. For *solere* cf. D. XXIV. 3. l 57 *ususfructus ad heredem non solet transire*: XXIII. 3. l 43 pr.

**semel cui quaesita** ['after once being gained by any one'. *quaesita* seems to be synonymous with *adquisita*; so below § 3 *quod fructuario adquiri, non potest proprietario quaeri*, § 6 fin.



**heredem]** D. L. 16. l 24 (Gai.) *Nihil est aliud hereditas quam successio in uniuersum ius quod defunctus habuit.* Similarly Julian (ib. 17. l 62); XXIX. 2. l 37 (Pomponius) *Heres in omne ius mortui, non tantum singularum rerum dominium succedit, cum et ea, quae in nominibus sint* (i.e. debts) *ad heredem transeant.* There were however some exceptions to the complete representation of the deceased by the heir. The heir could bring all actions which his predecessor could, except for insult and the like (*iniuriarum et si qua alia similis inueniatur actio*, Gai. iv. 112); and the heir of an *adstipulator* could not bring an action on the stipulation (ib. 113). Actions on torts of his predecessor (*ex maleficiis poenales ueluti furti, ui bonorum raptorum, iniuriarum, damni iniuriae*) could not be brought against an heir, nor could an action on the stipulation be brought against the heir of a *sponsor* or *fideiussor* (ib. 112, 113).

An adoptive father, like a natural father, becomes heir through his adopted son, but otherwise a transference of the position of heir from the heir by right to another person was possible only in one case. The statutable heir, i.e. heir *ab intestato*, could before entering on the inheritance formally surrender it (*in iure cedit*) to another, who then became heir. If the statutable heir once entered on the inheritance he could no longer completely and effectually divest himself of it (Gai. II. 35). Practically however any heir could put another in his place by a sale of the inheritance for a real or nominal price. Legally he remained heir, but, by stipulations entered into between them, the purchaser was bound to guaranty him against the burdens of the inheritance, and the heir was bound to allow the purchaser all the benefits of the inheritance (Gai. II. 252; D. XVIII. 4. See note above on l 12. § 4. p. 90).

By the action of the Praetor an inheritance was also in certain cases transferred in effect wholly or partly to another. Technically the Praetor did not displace the heir but gave the *bonorum possessio* to another and protected him in it. *In omnibus uice heredum bonorum possessores habentur: Bona autem hic plerumque solemus dicere uniuersitatis cuiusque successionem qua succeditur in ius demortui, suscipiturque eius rei commodum et incommodum; nam siue soluendo sunt bona siue non sunt, siue damnum habent siue lucrum, siue in corporibus sunt siue in actionibus, in hoc loco proprie bona appellabuntur* (D. XXXVII. 1. l 2; l 3 pr.).

**adrogatorem]** If a person *sui iuris*, or, as the Romans would call him, a *paterfamilias*, was to be adopted by another, the procedure was by a bill (*rogatio*) approved by the pontifices and passed by the curiae, who however even in Cicero's time were not really assembled but were represented by thirty lictors (Cic. *Rull.* II. 12. § 31). The form of the bill is given by Gellius (v. 19; cf. Cic. *Dom.* 29) *Uelitis iubeatis ut L. Valerius L. Titio tam iure legeque filius siet, quam si ex eo patre matreque familias eius natus esset, utique ei uitae necisque in eum potestas siet, uti patri endo filio est. Haec ita uti dixi, ita uos Quirites rogo.* From this procedure came the terms *adrogator* and *adrogatio*, which we first meet with in Gaius and

Gellius. Cicero uses *adoptio* or *adoptatio* of the adoption of a *paterfamilias* as well as of a *filius familias*, and so do the lawyers, frequently distinguishing the former by *adoptio quae per* (or *apud*) *populum fit* from the latter *adoptio quae apud praetorem fit*.

The effect of arrogation was (before Justinian) to transfer as a whole (*per universitatem*) the property and future acquisitions of the person arrogated to his new father. All the children, who were in his power, fell under the same power as himself, and became grandchildren of the adopter of their father (Gai. I. 107; D. I. 7. 1 15; 1 40). But the loss of civic position (*capitis deminutio*), resulting from the adoption, caused a loss altogether of rights attached to his person, viz. any usufruct vested in him, any services which his freedman had sworn to render him (cf. D. XXXVIII. 1. 1 7; 1 9) and some others (Gai. III. 83; the text is mutilated). At the same time debts owed by the arrogatee on his own account did not in strict law become chargeable on the arrogator, but dropped altogether. The Praetor however gave the creditors a right, if their claims were not duly satisfied, to obtain payment by selling all the property, that would have been their debtor's, if he had not been adopted. If however the debts were owing by the arrogatee in the capacity of heir to some one else, the arrogator took the burden as parcel of the inheritance, becoming heir in lieu of the arrogatee (Gai. III. 84). Diocletian substituted a rescript of the emperor for the procedure *per populum* (Cod. VIII. 47 (48) 1 2. § 1; 1 6). Justinian did away with the loss of a usufruct by *cap. dem.* (Cod. III. 33. 1 66), and cut down the right acquired by the adoptive (as of the natural) father in the property of the son to a usufruct, and only on the son's death unemancipated gave him the ownership, except in certain cases. If the son was emancipated, the father still retained half the usufruct. The son had in no case the ordinary rights of a proprietor against his father as usufructuary (Just. III. 10. § 2; Cod. VI. 61. 1 6; 59. 1 11).

A person under the age of puberty could not be arrogated before Antoninus Pius authorised it, and then only under certain conditions and safeguards for the interest of the arrogatee (Gai. I. 102; D. I. 7. 1 17; 1 18; 1 22, &c. XXXVIII. 5. 1 13; and see Gell. I. c.).

**u. f. in annos singulos legatus]** See note above on 1 20.

**ut supra scriptum est]** i.e. *stipulatus est in annos singulos certum aliquid*.

**prout, &c.]** 'according as the usufruct shall be lost by change of civic position and afterwards be recovered, the right acquired by the stipulation will shift, and after passing to the heir' (who is taken as the proprietor) 'will return to the original fructuary'.

**capitis minutione]** (a) It is difficult to fix the proper or original form of this expression on account of the variety in the mss. In Gaius the phrase is generally abbreviated to K. D, but when written in full is *capitis diminutio*; once (III. 27) we have *kapite minuti* (see Studemund's *Apograph*).

p. 274). The Vat. Fragments, §§ 60—64, though much mutilated, appear to agree with Gaius: having several times *diminutio* (for which the Digest often substitutes *minutio*), once (at least) *minutio*. Ulpian and the Florentine ms of the Digest have *deminutio*, *deminutus*, *minutio*, *minui*, *minutus*. In *Collat.* vi. 3. § 2 *minutio*. The lay writers rarely use the term. According to modern editions we have Cic. *Top.* 4. § 18 *se capite deminuit*; 6. § 29 *capite deminuti*; Liv. xxii. 60. § 15 *deminuti capite*; Caes. *Ciu.* ii. 32. § 9 *cap. diminutione*; Gell. i. 12. § 9 *capitis minutione*, and so also Tertull. *Spect.* 22; Paul. ap. Fest. p. 70 *deminutus capite*.

(b) The origin of the phrase is uncertain. Plautus (e. g. *Men.* 304, *Most.* 266; &c.) has *diminuam caput* of a threat 'to break a person's head' in the literal sense. *Caput* is often used metaphorically of a man's life or personal existence, e. g. in such phrases as *de libero capite iudicare*, *causam capitis dicere*, *certamen capitis et famae*, *accusare capitis* (sc. *iudicio*?), death or banishment being the result, if the accused were condemned (D. xxxvii. 14. l 10). Hence 'head-breaking' (*diminutio*) may have been the original expression, afterwards softened, or perhaps corrupted (as *caput* lost its vivid original meaning, and became a name for a congeries of rights) into 'head-lesening', 'head-abating' (*deminutio* or *minutio*. For this use of *deminuere*, cf. D. xxxiii. 8. l 6 pr. *deminui singula corpora pro rata debebunt*).

(c) A man's *caput* or personality as a member of a community, and thereby entitled to legal (non-political) rights, included as its basis freedom, citizenship, and membership of a family. A slave had no *caput*: he was a thing, not a person, and consequently in law had no rights. A free stranger was as such not entitled to marry with, or inherit from, a Roman, to hold property in Roman land, or enter into commercial dealings under the same forms and securities as a Roman. The *ius civile* was for Romans only. Further, the Roman state was an aggregate, not of individuals but of families. A member of a Roman family was necessarily a freeman, and as a member was a citizen. There were thus three degrees of 'head-breaking'. Loss of freedom carried with it the loss of citizenship and family-membership: it was *maxima capitis deminutio*. Loss of citizenship but not of freedom was a *minor cap. dem.*; still it carried with it loss of family membership. Loss of this last without ceasing to be free or a citizen was *minima cap. dem.* It was not mere loss either. He lost his place in one family, because he became a member of another. And hence *capitis deminutio* generally (D. iv. 5. l 1; cf. Gai. i. 152) and *minima cap. dem.* in particular (Ulp. 11. § 13) were called *status permutatio*. For *minor cap. dem.* the term *media* is also used (Gai. i. 159; D. iv. 5. l 11); and both the two first-named are called *magna c. d.* (D. xxxviii. 16. l 1. § 4; 17. l 1. § 8) and *maiores* (Gai. i. 163) in contrast to the last.

(d) For *c. d. maxima* see Gaius (i. 160; *Inst.* i. 16. § 1) and the criticism by M. Cohn (*Beiträge*, ii. pp. 45—73). *Media cap. dem.* was according to Gaius brought about by the prohibition of the use of fire and water, to which Justinian adds the case of deportation to an island: and Paulus (D. iv. 5. l 5.



§ 1) the case of deserters, and of persons adjudged by the senate or by a law to be public enemies (Cohn, pp. 97—102). *Minima cap. dem.* was caused by adoption, by coemption, by mancipation, and by manumission (Gai. i. 162). Adoption was either of a person *sui iuris* (i. e. arrogation, on which see the note p. 164), or of a *filius familias*, which proceeded by means of mancipation and manumission (Gai. i. 134). Coemption was for three purposes; (1) for marriage, (2) for changing a guardian, (3) for making a will (Gai. i. 113—115). Mancipation and manumission took place in connexion with one another for two purposes, (1) for emancipating a child, (2) for enabling a child (*filius familias*) to be adopted. In order to break the father's power he had to make a fictitious sale (mancipation) of his children or grandchildren to some friendly person, who holding them in technical slavery (*in mancipio*) manumitted them therefrom. But the XII Tables had (apparently in order to put some check on a father's powers) enacted, that, if a father sold his son three times, the son should be free. The lawyers used this for the purpose of effecting adoption and emancipation, and took it literally. A son must be mancipated three times. After each of the first two mancipations the son, though set free by his new owner, reverted into his father's power, and only after the third mancipation was the tie dissolved, so that the son could now be claimed by an adoptive father, or be set free altogether. But a daughter and grandchildren were not 'sons', and therefore the XII Tables did not apply, and one mancipation was held to be sufficient to dissolve the father's (or grandfather's) power. (Gai. i. 138; D. xxviii. 3. 1 8. § 1.) It is I conceive to the reiterated processes, necessary in the case of a son, that Gaius refers when he says (i. 162) *Quotiens quisque mancipetur aut manumittatur, totiens capite diminuatur*. But repeated 'head-breakings' are also possible in the case of a woman twice or oftener married by coemption (cf. D. xxxiii. 1. 1 22), or twice or oftener changing her guardian. Other cases in which a person would experience more than one *cap. dem.* are possible, e. g. repeated offences leading to loss of liberty or citizenship, with intervening pardons, but this would be rare in one person's life. The cases of mancipation and coemption are a sufficient basis for the practice of conveyancers in suggesting to testators that a usufruct should be left with the precautionary addition '*quotiens capite minutus erit, ei lego*' (D. vii. 4. 1 3 pr.), or, which came to much the same thing, with the words *in singulos annos*, &c. (ib. 1 1. § 3). Coemption had ceased in Justinian's time (see above note on *quamvis non soleat*); and a simple procedure before the praetor was by him substituted for the mancipations, whether for manumission or adoption (*Inst.* i. 12. § 6; *Cod.* viii. 47 (48); 1 11; 48 (49) 1 6).

(e) Why *capitis deminutio* caused a loss of the usufruct is a question which has no authoritative answer. Savigny says that it made the subject into a new man (*System* ii. 70). Scheurl treats *cap. dem.* as civil death (cf. Gai. iii. 153 *civili ratione capitis diminutio morti exaequatur*) which is a stronger expression for the same view as Savigny's (*Beitr.* i. p. 235).

Mandry refers it to the principle that *cap. dem.* put an end to all such claims and obligations, which could not have been established in that person in the position now assumed by him (*Familiengüterrecht*, I. p. 172 sqq.). Cohn regards it as an effect of the non-transferability of a usufruct or use from one person to another (*Beitr.* II. p. 275). In truth a usufruct was originally a special favour or provision for a particular person: it was not a mere piece of property or marketable right, which was given to a person, to be retained or disposed of as he chose. And a 'head-breaking' was even in its less important degrees a change of the economical and social position of a person. Whether adopted or emancipated, whether a wife under her husband's power or a woman with new guardians, the person was differently situated, and therefore so far at least a different subject for rights and obligations. The loss of agnate relationship was thus a type of the change of position; and the rule of law, which sprung from that, received a new justification and a continued acquiescence from the practical circumstances attending in most cases a *capitis diminutio*.

(f) The connexion of *capitis diminutio* with the loss of agnate relationship is shewn by its being treated by Gaius, Ulpian (XI. § 9), and Justinian (*Inst.* I. 16) in connexion with the statutable guardianship of agnates. In the Digest (IV. 5) in accordance with the Edict, it comes among other occasions which called for the interference of the Praetor in restoring the equitable position, as between plaintiff and defendant, which had been legally lost owing to duress, fraud, imprudence of minors or other unjustifiable cause.

**mox restitutus**] 'restored by the terms of the legacy', which, strictly speaking, gave a fresh legacy each year, but might be considered to restore the former legacy lost by *cap. dim.* See note on l 20.

**ambulabit stipulatio**] 'the stipulation (i.e. the usufruct stipulated for and the right of action, in case it was refused) will shift'. So of successive purchasers (D. IV. 4. l 15) *Ubi restitutio datur, posterior emptor reuertit ad auctorem suum poterit: per plures quoque personas si emptio ambulauerit, idem iuris erit*; of the liability on a tort (ib. 5. l 7. § 1) *Iniuriarum et actionum ex delicto uenientium obligationes cum capite ambulant*; of possession (D. V. 3. l 25. § 8); of *bonorum possessio* (D. XXXVII. 11. l 2. § 9). So *ambulatorius* 'shifting' (D. XXIII. 5. l 10; Cod. VI. 2. l 22. § 16).

**ad heredem**] i.e. the heir of the testator who left the usufruct, which heir is here presumed to be the owner of the propriety.

§ 3. **quaestionis est**] 'it is a question', or 'matter for inquiry'. So D. XV. 1. 19. § 6; l 11. § 3; XIX. 1. l 13. § 7; &c.; *illud dubitationis est, an, &c.*, D. XXIII. 2. l 46; *rationis est*, ib. l 34 pr.; *moris est*, Quint. I. 10. § 20; *iuris esse*, infr. l. 36 pr., &c.

**quod adquiri fruct. non potest**] e.g. anything which a slave stipulates for the fructuary otherwise than *ex re fructuarii* or *ex operis suis*: or anything which the slave may gain even *ex re fructuarii* during the interval between the extinction of the usufruct and its re-constitution, as in the

last section. The act of the slave must however not be one in itself null: cf. § 5. The doctrine of the text is also given in D. XLV. 3. l 31 *Si iussu fructuarii aut bonae fidei possessoris servus stipuletur, ex quibus causis non solet iis adquiri, domino acquirit. Non idem dicitur si nomen ipsorum in stipulatione positum sit*, because the slave would then not have the *animus* to acquire for his master. Cf. ib. l 30. An analogous principle to that here given for the slave in usufruct is given for a slave common to several masters in D. XLI. 1. l 23. § 2 *Illud receptum est, ut quotiens communis servus omnibus adquirere non potest, ei soli eum adquirere cui potest.*

**ex re fructuarii]** See note on l 12. § 3 (p. 86).

**nominatim proprietario]** ‘expressly for the proprietor’. A contract made by stipulation was such as the stipulator expressed, if such contract was conformable to the principles of law. If a slave was not in usufruct, and was the property of one person, it mattered not whether he named his master or himself, as the person in whose favour the stipulation was made, or named neither. In any of these cases he gained for his master (D. XLV. 3. l 1 pr.). If he was in usufruct he gained for the fructuary, whether named or not, provided that it was *ex re fructuarii aut ex operis ipsius*, and provided that no one else was named as the beneficiary.

Under the law before Justinian the *proprietary* might be either *prop. ex iure Quiritium* or *qui in bonis habebat*. The statement in our text would then apply probably only to the latter; Gai. III. 166 *Qui nudum ius Quiritium in seruo habet, licet dominus sit, minus tamen iuris in ea re habere intelligitur, quam usufructuarius et bonae fidei possessor; nam placet ex nulla causa ei acquiri posse; adeo ut etsi nominatim ei dari stipulatus fuerit servus, emancipue nomine eius acceperit, quidam existiment nihil ei acquiri.*

**iussu eius]** A previous order from his master made the master responsible for the slave’s action, and therefore naturally made acquisition by the slave to be acquisition by the master. Cf. D. xv. 4. l 1 pr. *Merito ex iussu domini in solidum adversus eum iudicium datur, nam quodammodo cum eo contrahitur qui iubet. Iussum autem accipiendum est, siue testato quis siue per epistolam siue verbis aut per nuntium siue specialiter in uno contractu iusserit siue generaliter.* The order of a fructuary would have no such power as against the owner. See below. On the effect of an order by one of several masters of a common slave see Gai. II. 167; D. ib. l 5; l 6; Cod. iv. 27. l 2 (3.) What amounts to an order in the case of entry on an inheritance is discussed by Ulpian D. xxix. 2. l 25. See also Pernice, *Labeo* i. p. 504 sqq. on the subject generally.

**ipsi adquirere]** ‘acquires for him’, i.e. *proprietary*. On *ipsi* see above l 22. For the matter cf. D. XLI. 1. l 37. § 5; XLV. 3. l 39, where the question is raised by Pomponius how the fructuary is to recover from the proprietary in these circumstances. He says *Non sine ratione est, quod Gaius noster dixit, condici id posse domino.* Probably the *condictio* would be that called *sine causa* (D. XII. 7).

**contra autem nihil agit]** The proprietary has a general and



residuary power over the slave and right to the benefit of his actions, wherever the limited right of the fructuary does not come in. And an order from the proprietary of this slave, stating that the slave is acting for him, thus ousts the fructuary, even though the basis be the fructuary's estate or the slave's services. But the reverse is not the case. An order from the fructuary, or an express mention of him by the slave, does not give the fructuary any right, if the basis be the estate of the proprietary. (Cf. D. XLV. 3. 1 22 *Seruum fructuarium ex re domini inutiliter fructuario stipulari, domino ex re fructuarii utiliter stipulari*; ib. 1 31 *Si iussu fructuarii aut bonae fidei possessoris seruus stipuletur, ex quibus causis non solet iis adquiri, domino acquirit. Non idem dicitur, si nomen ipsorum in stipulatione positum sit.*) There is however a distinction between an order and an express stipulation; an order from the fructuary does not interfere with the proprietary's getting the benefit of what is stipulated for on the basis of the proprietary's estate: but, if this stipulation is in the name of the fructuary, the one neutralises the other, and the result is null; cf. ib. 1 30. See ib. 1 33, where the position of the *bonae fidei possessor* is again treated, and the reason in the case of an order is given that *iussum domino cohaeret*, 'only the master can give an effectual order'. Of course the fructuary is answerable for his slave's action taken in pursuance of his order (D. xv. 4. 1 1. § 8).

§ 4. The case here put is of a slave stipulating for the conveyance of the usufruct in himself. Whether he name the proprietary, or, without naming him, simply stipulate for the usufruct, the proprietary acquires it, in the first case by the force of the stipulation itself, in the other case by the principle that what is acquired by a slave is acquired by his master, cf. D. XLV. 3. 1 1 pr.; 1 15. It is not said from whom the slave stipulates for this usufruct; possibly from the fructuary; possibly from a third party who, if he could not obtain the usufruct, would have to pay an equivalent.

**exemplo serui communis]** A slave common to two persons stipulates for a thing which belongs already to one of them: if he stipulates expressly in favour of this one, his act is null: if he names the other, that other acquires the whole (*solidum*) of the thing. If neither of them had been the owner of the thing at first, the acquisition, if not expressed to be for one, comes to both in proportion to their shares in the slave (D. XLV. 3. 1 5; 1 37).

§ 5. **si seruo fructuarius operas eius locauerit]** 'if a fructuary lets out to a slave, in whom he has the usufruct, the slave's own services, the result is null'. This is because there is no real contract at all. A fructuary's slave hiring his own services from the fructuary, is hiring the fructuary's property from the fructuary (*ne quidem si rem meam, &c.*). What will be the rent? Evidently money acquired by the slave's services. But this is just one of the cases in which the fructuary's slave acquires for the fructuary. The result is that the fructuary (through the slave) is hiring from the fructuary the fructuary's own property and paying for it

with the fructuary's property—obviously a legal nullity. At the end of the section Julian says, that if the slave is expressly acting for the proprietary, the case is different: it is real business, and the proprietary acquires. Presumably an order from the proprietary would have the same effect (cf. § 6 *iussum pro nomine accipimus*). One is inclined to ask, why, if there were no express mention or order of the proprietary, the rule of Julian laid down in § 3 could not apply, the very fact, that the business would be invalid if the slave were presumed to be acting for the fructuary, being sufficient to shew that he was acting for the proprietary. The answer is, I take it, that such a hire of the slave's services by the slave was in practice not an uncommon event. The fructuary allowed the slave to make what he could, reserving to himself only a fixed payment or rent, the remainder being, in other words, allowed to count in the slave's *peculium*. But there was no legally binding obligation, and least of all did the fructuary mean by such an arrangement to bind himself to the slave's proprietary, unless the proprietary was expressly named in the formal contract, or the slave proved an order from the proprietary, on which if necessary the fructuary could sue the proprietary.

**et si ex re mea, &c.]** This is a general proposition not confined to the case of a fructuary and a fructuary's slave. A slave buying from me with my money, or lending me my own money, cannot bind me to any one. The whole business is null.

**seruus alienus bona fide mihi seruiens]** The good faith is that of the person *cui seruit*, not of the slave, and so long as this good faith continues, the slave acquires for his possessor on the same conditions only as a fructuary's slave, i.e. *ex re possessoris aut ex operis suis*. And the same applied where the person *bona fide seruiens* was really a free man (Gai. II. 92; III. 164; D. XLI. 1. l 23 pr. and § 1).

Such an occurrence as my having the services of another's slave, believing him to be my own, may arise as with any other chattel, e.g. an heir may have found him on the testator's estate, hired out or deposited with the testator, and may have sold him to me under the belief that he was part of the inheritance (Gai. II. 50; D. XLI. 3. l 36), or he may have delivered him to me in fulfilment of a legacy (cf. D. XLI. 8. l 5; l 6); &c.

**idem agendo]** 'by doing the same', i.e. *stipulando a me rem meam*. If he gained for any one it would be for his real owner. He cannot gain for me, whom he is actually serving, my own thing, and the same applies to the contract of letting and hiring. Why in such a case he does not gain for his owner may be explained as above in the case of a slave in usufruct. (The statement in D. XLI. 1. l 23. § 2, though confirmed, as Mommsen points out, by the Greeks and better expressed by them, seems to me imperfect and wrong in substance, and not in language such as Ulpian would have used. No slight emendation will put it right.)

**ne quidem]** See above note on l 15. § 7 fin. p. 126.

**fructuario]** ablative in apposition to *a me*.

**me non obligabit]** 'he will not bind me thereby'; i.e. I shall not be responsible on the contract as *locator*. The contract is legally null.

**regulariter]** 'as a rule'. A word not much used. It is found several times in the Digest, v. 3. 1 9; xv. 3. 1 3. § 2; xxx. 1. 1 71. § 1.

§ 6. **si duos fr. proponas]** i.e. Put the case of two persons (*A* and *B*) jointly having the usufruct of a slave, who by use of the property of one of them, say *A*, contracts with *C*. Does *A* get the whole benefit of the contract? or does it come to *A* and *B*, and if so, in what shares? or does it, or any of it, enure to the benefit of the owner of the slave? Scaevola had, it appears, discussed the same question, only assuming two *bona fide* possessors instead of two fructuaries, and said that it was the common belief (among lawyers) and supported by the logic of the case that *A* gets a share (proportioned to his share of the usufruct), but that the other share does not fall to *A* nor *B*, but to the owner. Clearly the reasoning is this: *A* is not entitled to it, because he is a stranger as regards the second share in the slave, *B* does not get it, because as *bona fide possessor* he can acquire through a slave only so far as he has contributed either some property or the slave's services. And in this case the acquisition being due to the use of *A*'s property only, *B* has no claim, and the excess of the acquisition over *A*'s share will fall to the owner (cf. *supr.* § 3). If the slave had acted expressly in *A*'s name or by *A*'s order, *A* would acquire the whole. So far Scaevola. Ulpian appears to approve of these opinions and to apply them to the case of the two fructuaries.

But in D. xli. 1. 1 23, Ulpian in a later book of the same treatise quotes Scaevola as saying in the same second book of his Questions exactly the reverse on one point. *Quam speciem Scaevola quoque tractat libro secundo quaestionum: ait enim, si alienus servus duobus bona fide serviatur et ex unius eorum re adquirat, rationem facere ut ei dumtaxat in solidum adquirat. Sed si adiciat eius nomen ex cuius re stipulatur nec dubitandum esse ait quin ei soli adquiratur, quia et si ex re ipsius stipularetur alteri ex dominis, nominatim stipulando solidum ei adquirit: et in inferioribus probat, ut quamvis non nominatim nec iussu meo ex re tamen mea stipulatus sit, cum pluribus bona fide serviret, mihi soli adquirat.* Similarly, Scaevola in his 13th book quoted in D. xlv. 3. 1 19. One of the Greek commentators (*Anonymus*) on Bas. xvi. 1. 1 25 notices the discrepancy between our passage and that in D. xlv. and proposes to get rid of it by taking that to relate only to the case of the slave acting in the name or at the order of the one. A possible explanation seems to be that suggested by Fuchs (*Krit. Stud.* 1867, p. 15 foll.) that Scaevola altered his mind in the 13th book, and that the extract in D. xli. originally stood *in partem adquirat*, and lower down *at* for *et*. Fuchs thinks that *at* being accidentally altered to *et* led the copyist (ignorant of D. vii. 1. 1 25. § 6) to alter *partem* to *solidum*. I should



rather be disposed to think that the words *uulgo creditum* which do not appear in the other passages contain some clue to the discrepancy; and that both opinions were stated by Scaevola, one as commonly believed and the other as logically correct; and that the compilers have in our passage insufficiently corrected the text. (See the next note.)

Why Scaevola changed his mind (if his second and thirteenth book really contained different decisions) is another question. Perhaps because it was simpler to hold that the whole was acquired by the person whose property was employed in getting it, than that the otiose owner got part which afterwards he would have to give up to the *bona fide possessor* (cf. D. XLV. 3. 1 39). On looking more closely at Ulpian's words in our passage, it will be seen that they are very cautious and do not really say more as regards the fructuary than that whatever is the law as regards two possessors in good faith will be law also for two fructuaries, and that so far as in any case the fructuary does not acquire, the owner will.

**partem—domino**] Ulpian has evidently written this carelessly, or more probably the compilers have made havoc of it: as it is dependent on *hoc facere ut*, we ought to have *pars ei.....quaeratur pars domino*. Ulpian has expressed it as if it were dependent directly on *ait*; or perhaps originally these words depended on *uulgo creditum*, and *rationem efficere* introduced a different view see (the last note). The subjunctive is found rightly in the corresponding passages, D. XLI. 1. 1 23. § 3 (*ait rationem facere.....ut.....adquirat*) and XLV. 3. 1 19 (*ratio facit ut.....adquirat*); and Stephanus has it right even in our passage (*τὸ εὐλογον ἀπαρτεῖ ἵνα...μέρος αὐτῷ προσπορισθῇ*). Another piece of similar carelessness is found a few lines lower down.

**accipimus**] 'we take', i.e. 'interpret', 'consider to be'. So D. XXXII. 1 73. pr., and often.

**erit dicendum ut .....erit quaesitum**] *ut* requires *sit quaesitum*. But *ut* itself is a doubtful usage after *idem erit dicendum*. We should have expected an infinitive object-sentence.

**quaeri ei**] sc. *proprietas domino*.

**ostendimus**] sup. § 3.

§ 7. **diximus**] In 1 21, which is from the previous book of Ulpian's Commentary.

**posse adquirere**] sc. *seruum*, i.e. that a slave can acquire for the person who has the usufruct of the slave (but only) in two cases, viz. if the slave is using for the purpose the fructuary's property (e.g. lending his money, selling or hiring out his land or goods, &c.), or using (e.g. hiring out) his own services.

**utrum tunc locum, &c.**] The subject was introduced in 1 21 by the case of a legacy (*si serui u. f. sit legatus*), though that passage being taken from the 17th book of Ulpian's Commentary on Sabinus and this from the 18th, one cannot lay much stress upon the point. But the fact,

that it was a question deserving of consideration whether the competence of a fructuary to acquire through the medium of a slave existed only in the case of a usufruct created by legacy, seems to imply that bequest was the original mode in which usufructs came to be established, and the same conclusion may be drawn from Gaius' words in 1 2. (cf. 1 6).

**per traditionem]** It is probable that this is one of Tribonian's alterations for *per in iure cessionem uel mancipationem* (see above on 1 3. pr. *pactionibus* p. 38), though perhaps it is not necessary to suppose it (cf. Vangerow, *Pand.* i. p. 757). In the days of the classical jurists there were four ways of establishing a usufruct by the civil law: (a) by a legacy *per vindicationem*, (b) by surrender in court, (c) by a reservation on a mancipation, (d) by adjudication in a partition suit. Of these only surrender in court was available as a voluntary conveyance *inter vivos* for all things whether *mancipi* or *nec Mancipi*. And the form of legacy *per vindicationem* was restricted (before Nero, Gai. II. 197) to things belonging to the testator in full civil ownership. Moreover, neither were lands in the provinces capable of surrender in court, nor were foreigners capable of so creating a servitude or holding it so created. Hence two substitutes came into use.

1. A personal obligation was created in lieu of a real right. Instead of the stiff bequest by *do lego* came a flexible obligation imposed on the heir (*per damnationem*), or the still more flexible *fideicommissum*, and instead of the formal conveyances by handtake or surrender in court resort was had to bargains and stipulations (see note pp. 36, 38). Thus servitudes could be practically constituted between foreigners and Romans and in provincial lands. The jurisdiction would be at Rome in the *praetor peregrinus*, in the provinces it would be in their respective governors.

2. But this did not properly meet the case of a neglect of the due formalities at Rome and in Italy. As with the transfer of property, so with the creation of these limited rights, delivery was often used when mancipation or surrender in court ought to have been used; and these sometimes even when used were not effectual, because the creator had a flaw in his title, or the intended acquirer was not legally capable, or the thing was not one conveyable by exclusively Roman conveyances. The Praetor however interfered and granted the protection of the court to any conveyances made in good faith and for sufficient ground. Hence arose two classes of servitudes, those constituted *iure legitimo*, and those constituted *per tuitionem praetoris* (D. VII. 4. 1 1. pr. *Parui refert utrum iure sit constitutus usufructus an uero tuitione praetoris; proinde traditus quoque usufructus, item in fundo uectigali uel superficie non iure constitutus, capitis minutione amittitur* (Vat. Fr. 61, which is much mutilated, includes the case of provincial lands); 9. 1 9. § 1; XLIII. 18. 1 1. §§ 6—9). Delivery in the case of a usufruct would be either induction into an estate, or actual

delivery of the slave or other chattel *utendi fruendi causa* (D. VII. 9. l 12), or acquiescence on the part of the owner in the actual exercise of his right by the usufructuary (which latter mode was indeed all that was possible in the way of delivery of other servitudes, *supr.* l 3. pr.; D. VIII. 1. l 20). The usufructuary had under the usual conditions the right to the *actio Publiciana* (D. VI. 2. l 11. § 1 *Si de usu fructu agatur tradito, Publiciana datur; itemque servitutibus urbanorum praediorum per traditionem constitutis uel per patientiam (forte si per domum quis suam passus est aquae ductum transduci): item rusticorum, nam et hic traditionem et patientiam tuendam constat; VIII. 3. l 1. § 2; VII. 6. l 3*).

In Justinian's time there would be left (*cf.* p. 36) the three modes enumerated in our passage, viz. legacy (without distinction of form), delivery (which had swallowed up mancipation and surrender in court, and had come to be regarded in the above named sense as applicable to servitudes), and bargains. There was also adjudication, which however was only applicable in special circumstances, and *longi temporis praescriptio* (see note on l 17. § 2, *usucapio*, p. 138). These two (and perhaps also the statutable usufruct of a father in his son's property, *Cod.* III. 33. l 17) are included under *aliud quaecunque modum*.

Ulpian's original text of our passage would have probably contained *per mancipationem uel in iure cessionem*. Whether it included *per traditionem* is very doubtful. In *Vat. Fr.* 47a Paulus says expressly *civilis actione (usus fructus) constitui potest, non traditione, quae iuris gentium est*; and Gaius (II. 28) denies absolutely the application of delivery to incorporeal rights, and, what is stronger, makes no mention in the succeeding sections of any establishment of a usufruct by any such mode. Gaius' denial is of course strictly accurate. A right cannot be delivered: and in order to remove the ambiguity of a delivery of land or a chattel to the usufructuary some formal declaration or agreement is necessary. But whatever preceded, whether mancipation, or surrender in court, or bargains and stipulations, or bequest in a will, there would follow (*cf.* p. 36) delivery of the thing to be enjoyed, or at least acquiescence by the owner in the exercise of the right by the person entitled to the easement. And this *traditio* or *quasi traditio* was the basis of the Praetor's protection, and availed even when informalities had occurred. (*de usufructu tradito* in D. VI. 2. l 11. § 1; *cf.* VII. 4. l 1. pr., I take to be a loose expression for *de re tradita utendi fruendi causa*, *cf.* VII. 9. l 12.) But, looking to the positive language of Paulus and the significant omissions of Gaius, it does not seem probable that Ulpian here named *per traditionem* as a constituent mode of creating a usufruct, and ranged it with *legatum* and *stipulatio*, and presumably with *mancipatio* and *in iure cessio*.

**omni fructuario adq.]** 'that any and every fructuary, be his title what it may, acquires in this way'. So also Bas. παντὶ τῷ τὴν χρῆσιν ἔχοντι; and Steph. προσπορίζεσθαι ταῦτα τῷ ὅπωςδῆποτε γενομένῳ οὐσούφρουκαρίῳ. The mss. have *omnia*. For the singular *omnis* *cf.* D.



XXXVI. 1. 1 15. § 5 *non omnis autem suspectam hereditatem cogere potest adiri, sed is demum, ad quem, &c.*; XXX. 1 77 *ab omni debitore fideicommissum relinqui potest* ('may be charged on any debtor').

1 26. **us. fr. interierit**] i.e. by the fructuary's death, or 'head breaking', or non-user, or expiration of time for which usufruct was granted.

**quod superest ad prop. pertinebit**] When the lessor sold the property leased, or when in any other way his right in the property came to an end before the expiration of the lease, the lease also came strictly to an end, the lessee having as a rule his action (*ex conducto*) against the lessor for his breach of contract (D. XIX. 2. 1 25. § 1; 1 33; Cod. IV. 65. 1 9). The lessee could not be forced to continue the occupation (D. IB. 1 32), but continuance on the part of both parties even without express agreement operated as a renewal (1 32; 1 13. § 11; 1 14). A fructuary (or his heir), if the lease was ended by the loss of the usufruct, was liable only if he had represented himself as the owner (1 9. § 1). The case in the text is however distinguished from ordinary cases, where the intended duration of the lease may be in excess of the leasing power, by the fact that the slave can act as an agent of the proprietor as well as of the fructuary (see above, 1 25. § 2), and thus the lease enures to the benefit of the fructuary until the usufruct lapses, and then shifts to the proprietor for the remainder of the term (*quod superest*). A usual period for a lease of land was five years (*quinquennium*, 1 9. § 1; 1 24. § 2, § 4; *lustrum*, 1 13. § 11), probably on the precedent of the censor's letting of public lands and taxes.

'Apportionment' does not mean more than 'assigning a part' and therefore is not open to the objection which Wächter (*Erört.* I. p. 79) makes in the case of the German *Vertheilung* 'division between two or more persons', viz. that it is properly applied only to such a case as that in our text, where the lease continues, notwithstanding the change in the person who has the leasing power. In other cases, e.g. where a fructuary has himself leased a farm or a house or a slave's services, the lease is at an end by the lapse of the fructuary's right. The proprietor can if he likes turn out the lessee, and enjoy the land, &c. himself, or make such new terms as he chooses. And so with a sale of the land leased, if the lease is not noticed in the contract of sale. The question of apportionment of rent will in any case arise in this form. What can the fructuary legally claim from the lessee, if the lease or the fructuary's interest in it lapse before the full term of the contract? The answer is, that it depends on whether the rent or wages or other periodical payment of the lessee is remuneration for the lessee's taking the natural produce of the thing let, or for the lessee's use of the thing (Wächter, l.c.; Elvers, p. 436). In the first case, e.g. an agricultural farm, the fructuary can claim only the produce gathered while the usufruct lasted. If it be gathered, it, or the lessee's payment in respect of it, belongs to the fructuary, though the day for

payment may not have arrived before the usufruct expired (below l 58. pr.). In the second case, e.g. a house or slave's services, the fructuary can claim payments rateably to the time which the usufruct has lasted (D. XIX. 2. l 9. § 1 *tenetur colonus, ut pro rata temporis, quo fructus est, pensionem praestet*). This last rule applies also to the case in our text. Whether the broken period was reckoned by days or months or otherwise is not stated. Probably it would depend, in the absence of any statement in the contract, on the nature of the thing and the custom of the country. In English law, as now settled by statute "All rents and other periodical payments in the nature of income shall, like interest on moneys lent, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly" (Williams' *Real Prop.* p. 30). This mode of reckoning would in the absence of any specific provision of periods for payment seem naturally to apply to the hire of a slave's services, which were technically equivalent to 'a day's work'. See note on l 12. § 3 (p. 88).

From the next sentence implying a contrast (*sed et si*) we may assume this first sentence of l 26 to be concerned with a lease of the slave's services for a certain time with periodical payments. Steph. treats it as a lease for five years at a fixed yearly salary, which is the case put above in l 25. § 2, and XLV. 3. l 18. § 3.

**sed et si ab initio certam, &c.]** The same rule will hold if the contract be for one lump sum for a fixed number of days' work. Then as the number of days' work performed before the lapse of the usufruct is to the whole number of days' work named in the contract, so is the amount claimable by the usufructuary to the whole fixed payment. So Steph., treating the contract as one for five years at a fixed sum for the whole period.

Some wax tablets found in Transylvania, included in *Corp. I. L.* III. p. 921 sqq. contain, amongst other agreements, some for services in the gold mines. Three, less mutilated than others, are given in Bruns, pp. 210, 211. In each case a lump sum is stated as the hire for a definite period, one of some months, one apparently of more than a year. Payments are to be made at intervals (*per tempora*, or *suis temporibus*), with penalties for failure to work and for failure to pay.

**capite deminuto eo]** 'if he is *capite deminutus*', *eo* of course being the fructuary, and the looseness of expression being very likely due to omissions from the text of Paulus by Tribonian. Mommsen suggests the insertion between *deminuto* and *eo* of *fructuario mortuoue*, so as to bring in the case of death as well as of *cap. dem.* Such a fuller statement would no doubt have been an improvement. On *capitis dem.* see above note on l 25. § 2 (p. 165).

**l 27. pendentes...maturos]** See notes on l 12. § 5 (pp. 91, 92).

**feret]** See note on l 12. pr. (p. 79).

**die legati cedente]** 'when the legacy vests'.

(a) When the person who is entitled to a legacy is ascertained, *dies cedit*, 'time runs': when the legacy becomes payable, *dies uenit* (*uenit*!) 'the time is come'. The two dates are sometimes identical, sometimes different. As a rule a legacy vests at the death of the testator (according to the *lex Papia Poppaea*, on the opening of the will, Ulp. xxiv. 31), i.e. whoever is then the person named as the legatee is entitled to it, and, if he dies, his heir can claim it. It will not however be payable, unless and until the testator's heir has entered on the inheritance, that being essential to the will duly taking effect. A legacy *in diem* or *ex die*, i.e. expressly bequeathed to a person on or from a future time, vests at the death of the testator, but is not payable till the prescribed time arrives. A legacy on condition does not vest till the condition is fulfilled, and hence, if the legatee dies before this, the legacy lapses altogether: the legatee's heir can claim nothing (D. xxxvi. 2. l 5; l 21). A legacy of a usufruct did not vest till the inheritance was entered on: as it could not be transmitted to the legatee's heir, time did not move till the legatee could at once begin *uti frui*. If the usufruct was given from a future date, or upon a condition, there would of course be a further postponement till the arrival of the date or the fulfilment of the condition (ib. l 5. § 2; vii. 3. § 3). It was the same with all legacies to slaves (Vat. 55): they were often coupled with manumission, and, as manumission only took effect on the inheritance being entered on, legacies to slaves did not vest before that. Otherwise they would vest while he was yet a slave, and therefore would enure to his master, not to him (D. xxxvi. 2. l 5. § 7; l 7. § 6; l 8).

(b) The origin of the phrase *dies cedit* is not certain. It is applied chiefly to legacies, but also occasionally to freedmen's services (D. xxxviii. 1. l 23. § 1; cf. l 34 *dum languet libertus, patrono operae quae iam cedere coeperunt, pereunt*); to time of mourning (*tempus cedit* D. iii. 2. l 8); to the year allowed for bringing an action (*annus cedit* D. iii. 6. l 6; iv. 6. l 28. § 4; iii. 24. l 15. § 4); to the time for accepting an inheritance (*dies cretionis cedere* Gai. ii. 10); or for claiming *bonorum possessio* (D. xxii. 6. l 1. § 1; xxxvii. 1. l 14); or for being excused from public duties (D. l. 5. l 4); to stipulations, when the event causing a forfeiture commences (D. xlvi. 7. l 13. pr.) cf. l. 16. l 213 '*Cedere diem*' significat incipere deberi pecuniam: '*uenire diem*' significat eum diem uenisse, quo pecunia peti possit. *Ubi pure quis stipulatus fuerit, et cessit et uenit dies: ubi in diem, cessit dies sed nondum uenit: ubi sub condicione, neque cessit neque uenit dies, pendente adhuc condicione.* I have not seen anywhere the application of the phrase to usucapion.

Probably the meaning of the phrase is 'the day moves', 'passes', 'goes': i.e. the right or claim was before only in embryo, a mere possibility: now it becomes a question of time; the day moves its first step (*dies cedit*): eventually it actually comes (*dies uenit*).

**adhuc pendentesprehendisset]** 'should have found them still



hanging'. They do not become his, till he has gathered them, but if they are yet ungathered, he has it in his power to make them his. If they had been separated from the ground by someone else (not acting for him), the property would already have passed away. Cf. D. VII. 4. l 13, and above l 12. § 5.

**stantes**] See note on *pendentes* l 12. § 5 (p. 92).

**ad fructuarium pertinent]** 'belong to him', but only in this sense, that he can make them his own by gathering. Cf. D. XXII. 1. l 25. § 1 *Cum ad fructuarium pertineant fructus a quolibet sati, quanto magis hoc in bonae fidei possessoribus recipiendum est, qui plus iuris in percipiendis fructibus habent? cum fructuarii quidem non fiant, antequam ab eo percipiantur, ad bonae fidei autem possessorem pertineant, quoquo modo a solo separati fuerint.*

§ 1. **dominus**] i.e. the owner who has granted the usufruct. See note on l 13. § 5 *paterfamilias* (p. 108).

**tabernis, &c.]** 'to use the shops (of which he has granted the usufruct) either for his goods, or for carrying on any business'. Ulpian in commenting on the edict, which gave the *actio tributoria* (see below on l 31) against any one *si scierit servum peculiari merce negotiari*, says *Licet mercis appellatio angustior sit, ut neque ad servos fullones uel sarcinatores uel textores uel uenaliarios pertineat, tamen Pedius scribit ad omnes negotiationes porrigendum edictum* (D. XIV. 4. l 1. § 1).

It was common in Rome and other places to have sheds attached to the outside of the houses, and such *tabernae* were used for a variety of purposes. Thus the house of Pansa at Pompeii has on three sides shops and small lodgings, and among them a bakery (cf. l 13. fin.; XXXIII. 7. l 15. pr.); one of these only communicates with the house. (Of course *tabernae* might be independent buildings.) The encroachments of shopkeepers on the streets are declared by Martial VII. 61 to have made Rome into one big *taberna*. See Becker's *Gallus* ed. Göll, II. p. 282.

**utique]** 'of course'. The fructuary is not bound only to use them himself. He may let them; and may let them for a different class of goods from those for which the testator used them. Cf. l 9. fin.

**illud solum observandum]** 'this rule however must be kept, viz. that the fructuary must not exercise his right of usufruct either in a way alien to its proper nature and limitations, or so as to be an insult or outrage', probably to the proprietary or to the memory of the testator.

**abutatur]** See above note on l 15. § 1 (p. 117).

**contumeliose iniurioseue]** These words are much discussed in connexion with the *actio iniuriarum* (D. XLVII. 10). See note below on l 66. Exactly what usage would be held to be insulting and outrageous may not be easy to define. Stephanus illustrates *abutatur* by making the *tabernae* into a stable, and *contumeliose iniurioseue* by making them into a brothel. No doubt something of this sort is meant; cf. D. XVIII. 7. l 6. pr.

§ 2. **cuius testator quasi, &c.]** 'whose empty (or 'idle') service, if I

may say so, the testator was wont to use'. *Uacuus* is apparently opposed to trained or skilled service and special charge. *Quasi* is an apology for the expression, but one would have expected the order to have been rather *cuius quasi uacuo ministerio*. Stephanus has οἰκέτου ψιλλὴν καὶ μόνον ὑπηρεσίαν εἰωθότος τῷ δεσπότῃ ποιεῖν.

**disciplinis uel arte instituerit]** 'has given him education or professional training'. *Disciplinae* is a general word for schooling, and the plural emphasizes the variety of subjects of instruction. Cf. Quintil. viii. 3. § 75 *ut terram cultu, sic animum disciplinis meliorem uberioioremque fieri*; Suet. Gram. ii; Colum. iv. 3. § 2; D. xxvii. 2. 1 2 (of a guardian's claims for reimbursement) *si dicat impendisse in alimenta pupilli uel disciplinas*; of a slave, xix. 1. 1 13. § 22. *Arte* will refer here to training for a particular profession, e.g. as physician, actor, singer, gymnast, &c. So we have *seruus arte fabrica peritus* (D. xxxiii. 7. 1 19. § 1); *ars medica* (xxxviii. 1. 1 25. § 2); *ars pantomimi* (ib. 1 27); &c.

**§ 3. cloacarii nomine]** All rates and taxes or other charges fell upon the usufructuary, if accruing during his enjoyment. Such as had accrued due before, were payable by the heir of the testator. See 1 7. § 2 notes (p. 62). *Cloacarium* is only mentioned here and in D. xxx. 1 39. § 5 *Heres cogitur legati praedii soluere uestigial praeteritum uel tributum uel solarium uel cloacarium uel pro aquae forma*. Stephanus says ἐπιγινώσκειν τὸν οὐσουφρουκτιάριον χρή καὶ οἰκοθεν διδόναι, ἅπερ ὀφείλει ἤτοι εἰώθει δίδοσθαι περὶ τὴν ἀνακάθαρσιν τῶν ὀχετῶν ἢ τῶν δημοσίων ὄλκων. ὁ γὰρ κεκτημένος πλήσιον τῶν δημοσίων ὀχετῶν οἴκους ἀναγκάζεται ὡς ἐπὶ τὸ πλεῖστον τούτους ἀνακαθαίρειν. 'The usufructuary is bound to recognise and provide at his own charge what ought to be, or usually is, given in respect of the cleansing of the sewers or of the public watercourses'. The further statement that the neighbouring occupiers have as a rule to clear the sewers, as they have (Stephanus proceeds) to clean and care for the aqueducts and the public roads, is not mentioned so far as I can find elsewhere. In Justinian's time the cleansing of the sewers and watercourses and control of buildings, &c. belonged to the bishop and principal inhabitants: both trust funds and public moneys are named as applied to the defrayal of such expenses; and an imperial auditor (*discussor*) was occasionally sent to inspect, but without power of charging fees or imposing taxation (Cod. i. 4. 1 26; x. 30. 1 4).

**ob formam aquae ductus]** (*a*) *Forma* is a general term denoting the trough or channel of the aqueduct, i.e. the inclosing structure of the water. Frontinus *Aq.* 126, after speaking of the damage caused by the neighbours to the aqueducts by planting trees too near, goes on *Deinde uicinales uias agrestesque per ipsas formas dirigunt*, 'they make occupation- and farm-roads along the (outside of the) aqueducts; ib. 75 *Plerique possessorum, e quorum agris aqua circumducitur, subinde formas riuorum perforant*, i.e. 'tap the aqueducts for their own purposes'. Probably *forma* was used specially of a brick or stone-built conduit, cf. Anon. (M. Cetus Faventinus? Teuffel, *Gesch.* § 264 ed. Schwabe) *de diuers. fabr. arch.*

(appended to Rose's edition of Vitruvius) 6 *Ductus autem aquae quattuor generibus fiunt, aut forma structili aut fistulis plumbeis aut tubis uel canalibus ligneis aut tubis fictilibus. Si per formam aqua ducitur, structura eius diligenter solidari debet, ne per rimas pereat. Canaliculus formae iuxta magnitudinem aquae dirigatur.* Vitruvius in the passage on which this is founded uses (for the first genus) the term *riuis per canales structiles* (VIII. 7. init.). An inscription at Cora (1779, Wilmanns) records that some magistrates *aquam caelestem dilabentem montibus collectam interciso aggere per formam cur(a) sua fuctam in piscinis repurgatis longo tempore cessantibus p(ecunia) p(ublica) perduxerunt.* Cf. Cod. Theod. xiv. 6.13 *Calcis autem uehationis* ('carting of chalk') *ita sit ratio partita, ut mille quingenta onera formis, alia sartis tectis annua deputentur;* ib. xv. 2. 1 5 *Eos, qui aquae copiam uel olim uel nunc per nostra indulta meruerunt, eius usum aut ex castellis aut ex ipsis formis iubemus elicere, neque earum fistularum, quas matrices uocant, cursum ac soliditatem attentare,* i.e. from the reservoirs and main channels, not from the subordinate pipes; (this law is greatly confused by being amalgamated with the next in Cod. Just. xi. 43. (42) 1 3); ib. 1 8; 1. 9. A comes *formarum*, president of aqueducts, is mentioned in the *Notitia Dignitatum*. But the most important passage for our text is ib. 1 1 (=Cod. Just. xi. 43. (42) 1 1) 330 A.D. *Possessores, per quorum fines formarum meatus transeunt, ab extraordinariis oneribus uolumus esse inanes, ut eorum opera aquarum ductus sordibus oppleti mudentur, nec ad aliud superindictae rei<sup>1</sup> onus iisdem possessoribus attinendis, ne circa res alias occupati repurgium formarum facere non occurrant.* So an extract from 'Mago and Vegoia' in the *Gromatici*, p. 349, Lachmann. *Aquarum ductus per medias possessiones diriguntur, quae (qui?) a possessoribus ipsis uice temporum repurgantur: propter quod et leuia tributa persolunt* (where *leuia* is probably, 'light' in comparison with the usual tribute).

(b) What the payment was which is named in our text is not quite clear. In D. xxx. 1 39. § 5 (quoted in last note) we have a payment *pro aquae forma*. In XIX. 1. 1 41 Papinian says *In uenditione super annua pensitatione, pro aquaeductu infra domum Romae constitutum, nihil commemoratum est*, where Mommsen suggests *intra* and *constituto*. Perhaps *constituta* may be better. Frontinus (Aq. 118) says the expenses of the public establishment for the care and repairs of the aqueducts were defrayed from rents (*uectigal*) imposed on occupiers of land or buildings adjoining the canals and reservoirs. Stephanus takes our passage to refer to a payment for cleansing. Certainly a fixed rent imposed on the neighbouring occupiers, by way of commutation for an ancient duty of cleansing the aqueduct, seems the most likely meaning; but a water-rent would also suit the passage of Papinian. It is not very probable that Frontinus referred to rents paid by occupiers of surplus lands, bought by the state when constructing the aqueducts, for these were, he says, sold again (§ 128).

<sup>1</sup> Godefroi explains this by *cuiuscunque superindicti*, i.e. 'of any other tax'. Perhaps it is a Greek genitive 'other than the above-named tax'.



**si quid ad collationem uiae]** ‘anything that may be payable for a highway rate’. Cf. D. XIX. 1. l 13. § 6 *Si qua tributorum aut uectigalis indictionis cuius (quid Flor.) nomine aut ad uiae collationem praestare oportet, id emptorem dare facere praestareque oportere*; L. 4. l 14. § 2 *uiarum munitiones, praediorum collationes non personae sed locorum munera sunt*; 5. l 11 *praediorum collatio uiae sternendae*. Cod. VIII. 13. (14) 16 *In summa debiti computabitur etiam id quod propter possessiones pignori datas ad collationem uiarum muniendarum praestitisse creditorem constiterit*.

*Collatio* is used sometimes of the total amount raised: e.g. the amount raised to pay off the Gauls is called *tributo collatio facta* (Liv. VI. 14. § 12; cf. IV. 60. § 6); sometimes of the quota of each person; e.g. *plerique omnem collationem palam recusabant* (Suet. Ner. 44). It is frequent in the imperial times, e.g. Cod. Theod. XI. 5. l 4; 7. l 14; 17. l 4; &c. The corresponding verb *confertur* is used in the next line.

On the maintenance of roads, cf. Sicul. Flac. (Grom. p. 146, ed. Lachm.) *Sunt uiae publicae quae publice muniuntur et auctorum nomina optinent; nam et curatores accipiunt, et per redemptores muniuntur, et in quarundam tutelam a possessoribus per tempora summa certa exigitur. Uicinales autem, de publicis quae deuertuntur in agros, et saepe ipsae ad alteras publicas perueniunt, aliter muniuntur per pagos, id est per magistros pagorum, qui operas a possessoribus ad eas tuendas exigere soliti sunt: aut, ut comperimus, unicuique possessori per singulos agros certa spatia adsignantur, quae suis impensis tueantur*; Dig. XLIII. 8. l 2. § 22 where the test of a road being private is its having been constructed *ex collatione priuatorum*, whereas if it be repaired *ex coll. priu.* it may be public all the same; Cod. Theod. xv. 3. l 2 (A.D. 362) *In muniendis uis iustissimum aequitatis cursum reliquit auctoritas. Singuli enim loca debent quaeque sortiri ut sibi consulant uel negligentia uel labore. Igitur eos loca iuxta morem priscum delegata curare oportebit*. Cf. Kuhn, *Verfassung des röm. Reiches* I. p. 62. In Rome the house-owners were bound to repair, or pay for the repairing of, the public roads in front of their house: *Lex Iul. municip.* (Bruns p. 96 sqq.) 7—13.

**quod ob transitum exercitus, &c.]** ‘what is contributed out of the produce on account of the passage of troops’. Sicul. Flac. (p. 165 ed. Lachm.) *Quotiens militi praetereunti aliiue cui comitatu (any official suite) annona publica praestanda est, si ligna aut stramenta deportanda, quaerendum quae ciuitates quibus pagis huiusmodi munera praebere solitae sint*. Nothing more specific seems to be known. Soldiers carried their rations with them, but were allowed to receive from their hosts, though forbidden to take by force, oil, wood and bedding, cf. Cod. Theod. VII. 4. l 5; 9, &c.; Cod. Just. XII. 37. But these constitutions are of the fourth century; and at different times in the various provinces rules for the provisioning of the troops on march may easily have taken the shape of requiring the occupiers of the district to provide rations, and perhaps of crediting them with the value as paid on account of taxes. The *possessores* were required or allowed sometimes to pay their taxes, or part of them, in kind. Cf.

Hygin. *Gram.* p. 205. (See Marquardt, *Staatsverw.* II. p. 224 foll.) Such a method of provisioning troops or officers in transit was prescribed by Justinian in the 130th Novel as a universal rule. In earlier times we have a reference, not indeed to supplies being made to an army on the march, but to troops being quartered for the winter and requisitions being made by the magistrates. For the *lex Antonia de Termessibus* (A. U. C. 683, Bruns p. 86) forbids (cap. 5) soldiers being quartered for the winter on the inhabitants of the free and allied community of Thermeses in Pisidia, or the magistrates making any further requisitions on them than were authorized in the *lex Portia* (the details of which are unknown; cf. Liv. xxxii. 37).

**si quid municipio]** sc. *debeatur*.

**possessores]** 'occupiers of land, land-owners'. Besides the technical sense of *possessor* as distinguished from 'owner' (D. L. 16. l 115) *possessor* (*possessio, possidere*) is often used in a more popular sense, as we in English speak of the possessors of land, and possessions in land, meaning owners of and property in land. Cf. D. L. 16. l 78 *Interdum proprietatem quoque uerbum possessionis significat, sicut in eo qui 'possessiones suas' legasset, responsum est*; XI. 4. l 1. § 1 *Senatus censuit ne fugitivi admittantur in saltus, neque protegantur a uilicis uel procuratoribus possessorum*. So security for appearance in court was not required from *possessores rerum immobilium*, and Macer goes on to define who for that purpose come under this term (D. II. 8. l 15) *Possessor is accipiendus est, qui in agro uel ciuitate rem soli possidet aut ex asse aut pro parte. Sed et qui uectigalem, id est emphyteuticum, agrum possidet possessor intellegitur. Item qui solam proprietatem habet, possessor intellegendus est: eum uero qui tantum usum-fructum habet, possessorem non esse Ulpianus scripsit... Si fundus in dotem datus sit, tam uxor quam maritus propter possessionem eius fundi possessores intelleguntur... Tutores, siue pupilli eorum siue ipsi possideant, possessorum loco habentur*; XXVII. 9. l 5. § 10 *ne propter modicum aes alienum magna possessio distrahatur*; XLIX. 18. l 4 *Uiae sternendae immunitatem ueteranos non habere rescriptum est: nam nec ab intriutionibus quae possessionibus fiunt ueteranos esse excusatos palam est*; L. 15. l 4. § 2; 15. pr.; Cic. *Agrar.* III. 4. § 15 *Siluiam Scantium uendis: populus Romanus possidet: defendo. Campanum agrum diuidis: uos estis in possessione: non cedo. Denique Italiae Siciliae ceterarumque prouinciarum possessiones uenales ac proscriptas hac lege uideo: uestra sunt praedia: uestrae possessiones*. So, frequently in the *Gromatici*, of persons to whom land had been assigned as property; e.g. p. 130 *in agro diuiso continuas possessiones et adsignantur et redduntur*; p. 201 *adsignare agrum circa extremitatem oportet, ut a possessoribus uelut terminis fines optineantur*; pp. 49, 50, 51, &c. (Cf. Savigny, *Recht des Besizes* § 8. p. 104 ed. 7). In the arrangements of the later empire the tax payers are distinguished into two classes *possessores* and *negotiatores*, 'landowners and traders', the former paying according to the extent and cultivation of their land, the latter paying according to the

amount and value of their total property. Hence the position of *possessores* in such expressions as Cod. Theod. ix. 27. l 6 *si quis forte honoratorum, decurionum, possessorum, postremo etiam colonorum, aut cuiuslibet ordinis*; XIII. 9. l 4 *possessoribus uel senatoribus uel priuatis*; Nov. Valentin. III. 6. l 2. § 1 *senatores uel uniuersos possessores*, &c. See Kuhn's *Verfassung* I. 271; Marquardt, *Staatsverw.* II. p. 227.

*certam partem fructuum uiliori pretio addicere*] Kuhn (*Verfassung* I. p. 64) is probably right in referring (as Noodt *de usufr.* I. cap. 9 had previously suggested) to this arrangement the passage in D. L. 3. l 18. § 25 *Praeterea habent quaedam ciuitates praerogatiuam, ut hi, qui in territorio earum possident, certum quid frumenti pro mensura agri per singulos annos praebant: quod genus collationis munus possessionis est* ('is a duty falling on landed property'). Nothing else appears to be known of the arrangement.

*addicere* is used of the judge assigning an insolvent judgment debtor to his creditor, e.g. Liv. vi. 15. § 9; Cic. *Flac.* 20. § 48; Quintil. vii. 3. § 26; of the assignment of the goods (in place of the person) of the same, e.g. Cic. *Uerr.* I. 52. § 137; Gai. III. 79; of similar action of the Praetor in the formal *in iure cessio*, e.g. Gai. II. 24; or in adoption, e.g. Gai. I. 134; or in appointing a judge, e.g. D. v. 1. l 39; l 46; l 80; or arbiter x. 2. l 30; of an auctioneer knocking down the thing to a bidder, e.g. Cic. *Caecin.* 6. § 16; Suet. *Iul.* 50; *Lex Uipasc.* 9. p. 142 Bruns; of a seller making over the property, only on condition that no better offer is made by a certain day (called *addictio in diem*), e.g. D. xviii. 2. l 4. § 1 *seruis uenditis et in diem addictis*. Also metaphorically, 'give up', 'hand over', e.g. Cic. *Pis.* 24. § 56 *Uendebas auctoritatem huius ordinis, addicebas tribuno pl. consulatum tuum*; *Uerr.* Act. I. § 12; *Planc.* 39. § 93 *senatus, cui me semper addixi*; &c., cf. D. xli. 1. l 30. § 3. In our passage it seems to mean nothing more than *uendere*: cf. D. li. 18; 8. l 7 (5) *Decuriones pretio uiliori frumentum quod (quam?) annonae temporalis est patriae suae, praestare non sunt cogendi*; in xlvi. 11. l 3 *uendere* is used in the same context.

*fisco*] We should say 'to the Crown'. Baskets were used to convey money in Cicero's time, *Uerr.* Act. I. 8. § 22; Act. II. 3. 79. § 183. The application of *fiscus* to the imperial treasury is not without analogies in English, e.g. the 'Privy Purse' and the 'Exchequer' (from the table-cover like a chess-board). It is necessary to distinguish five things in imperial times. 1. *Aerarium*, called for distinction *aerarium Saturni* (from being kept in the temple of Saturn), the public treasury under the control of two *praefecti*. It received the taxes from the provinces which were under the senate. In and after the 3rd century those taxes came to the *fiscus*, and the *aerarium Saturni* became only the treasury of the city of Rome. 2. Augustus established an *aerarium militare* to furnish pensions to veterans. It was supported by the succession duty of 5 per cent. (*uicesima hereditatum*), and the duty of 1 per cent. on sales (*centesima rerum uenaliū*). It was managed by three *praefecti*. 3. The *fiscus* was the emperor's treasury which received the taxes from the imperial provinces, the proceeds of the



domain lands in all the provinces, the goods of condemned persons and other items. Out of this exchequer were defrayed the expenses of the army and navy, of the military roads, the post and public buildings, and the supply of corn to the City. It was under the control of a *procurator a rationibus*, also called *procurator fisci*, and from Diocletian's time *rationalis* (D. I. 19) and eventually *comes aerarium largitionum*. The *fiscus* belonged to the emperor, the *aerarium* (theoretically) to the people, but eventually the distinction dropped. Pliny speaks of it as real (*Paneg.* 36); Tacitus as of no consequence (*Ann.* VI. 2); Dio Cassius (LIII. 22) says he cannot distinguish them: Justinian treats them as identical (*Inst.* II. 6. § 14) and has doubtless often substituted *fiscus* for *aerarium* in the Digest. 4. The *patrimonium Caesaris* was the private property of the emperor derived from mines and other monopolies and from inheritances, but also including the revenues of Egypt (*Tac. H.* I. 11), such as in other provinces passed to the *aerarium* or *fiscus*. This was managed by *procuratores* and treated as crown property, passing to the imperial successor, not to the private heirs. 5. *Res privata*, separated from the *patrimonium* by Severus, with a separate *procurator* appointed to manage it, comprised such property as the emperor disposed of by will. See Marquardt, *Staatsverw.* II. 292 foll.; Mommsen, *Staatsrecht* II. 952 foll.; Hirschfeld, *Verwaltungsgeschichte* I. 1 foll.

**fusiones]** This word (except in the literal sense of 'pouring', 'melting') occurs only in Cod. Theod. XI. 28. 1 6 where a relaxation from payment of arrears is granted to Africa by Honorius *usque in initium fusionis quintae*, which is taken to mean 'to the end of the fifth taxation' (= *indictio*, on which see Savigny, *Verm. Schr.* II. 130; Marquardt, *Staatsverw.* II. 237). Bas. has *καὶ τὰ δημόσια τέλη ὁ τὴν χρήσιν ἔχων δίδωσιν*. Steph. after speaking of the occasional duty of selling cheaply to the city, adds *εἰώθασι δὲ καὶ τινὰς πράξεις εὐόνοῦς πρὸς τὸν φύσκον ποιεῖσθαι καὶ χρὴ καὶ τὸ ἐντεῦθεν βάρος ἐπιγνώσκειν τὸν οὐσουφρουκτουάριον δίδωσι δὲ καὶ τὰ δημόσια τελήσματα, ὡς μανθάνεις*, &c., referring to 1 7. *supr.* Mommsen takes the first part of this to refer to *fisco fusiones praestare*. The inferior mss. have *functiones* (for *fusiones*), a word often used in the codes of a public duty, and specially of a public tax, e.g. Cod. Just. IV. 49. 1 13 *Fructus post perfectum iure contractum emptoris spectare personam convenit, ad quem et functionum gravamen pertinet*; VII. 39. 1 6, &c. It is difficult to account for *fusiones* in the Flor. Ms.: otherwise *functiones* is a much more probable word for Ulpian to have used.

§ 4. **si per stipulationem servitus debeatur]** Hasse (*Rhein. Mus.* I. p. 103) takes this of an obligation on the heir to constitute a servitude, the obligation arising from a formal promise of the testator. Jhering (*Jahrbücher* x. 560) takes it of a servitude already constituted by a stipulation on the part of the testator or other previous owner. The expression *servitus debetur* seems a perfectly natural one to use in the former case; D. VIII. 4. 1 6. fin. is probably an instance; D. XLVI. 4. 1 13. § 3, which Hasse quotes, may or may not be one. In the latter case the expression is fre-

quently used (e.g. D. VIII. 2. 1 17. § 3; 3. 1 23. § 3; 1 34. pr.; XL. 1. 1 20. § 1). In practice there would often be little difference between the two, as a promise to constitute a servitude would probably be treated as sufficient without any further proceeding, just as in England an agreement for a lease or partnership, &c., is often acted on, without the deed ever being drawn or executed. Our passage seems so parallel to the question discussed by Marcellus in VIII. 4. 1 6 that I take it the testator had promised to grant a servitude, and Ulpian gives it as his opinion (*puto dicendum* is in l.c. *putat permittendum*), that the fructuary must permit the servitude to be exercised. Indeed the heir would have a right to impose it formally before putting the fructuary into his right (D. xxx. 1 116. § 4), and would not have to compensate the fructuary, for the usufruct would be held to have been bequeathed subject to that condition.

On the general question of constituting a servitude by stipulation see on 1 3. pr. (p. 38).

§ 5. **si seruus sub poena, &c.**] Occasionally certain conditions were imposed when a slave was sold. Four such are specially treated of; (a) that the slave should, after a certain time, or on arriving at a certain age, be set free; (b) that a woman should not be prostituted; (c) that the slave should not be set free; (d) that the slave should be removed and should not return to a particular place. See the titles D. xviii. 7; Cod. iv. 55—57. In all these cases a pecuniary penalty (*sub poena*) for breach was sometimes stipulated: but in the first case the slave became free without the purchaser's act at the time stated. This was by a constitution of M. Antoninus (D. xviii. 7. 1 10; xl. 8; Cod. iv. 57. 1 2; 1 3). The pecuniary penalty was apparently not exigible, the object being already secured (D. xlv. 1. 1 122. § 2; Cod. iv. 57. 1 6). In the second case the seller stipulated either for the right of resuming property in the slave (*abducendi potestas*), or for the slave's becoming *ipso facto* free: and freedom was declared by the Praetor, if the seller consented to the prostitution (D. xl. 8. 1 7; Cod. iv. 56. 1 1). In the third case the law came in aid, and nullified any manumission contrary to the condition, but an action for the penalty did not lie on the stipulation, but it did *ex uendito* (D. xviii. 7. 1 6; Cod. iv. 57. 1 5; D. xl. 1. 1 9. § 2; 9. 1 9. § 2). In the fourth case the usual stipulation was that, if the slave came and stayed in the prohibited district with the purchaser's consent, the seller should have the right *manus inicere* or *abducere*, i.e. to resume the property. If the purchaser set the slave free, the crown claimed him as slave (Vat. Fr. 6; Cod. iv. 55. 1 1). This condition was intended for the protection of a master from a violent slave, and could be remitted by the seller (D. xviii. 7. 1 1; Vat. Fr. 6). Cf. Jhering, *Jahrb.* x. 547, 548; Glück xvii. 199 foll.

**interdictis certis quibusdam]** ἐπὶ τῷ κολύεσθαι τινῶν Bas. ἐπὶ τῷ μὴ ἐπιμείναι αὐτὸν τῷ τόπῳ Steph.; in accordance with which latter Godefroi understands *locis*. But I see no reason for restricting the general words of our law. Any negative condition is included, though practically of usual

conditions those forbidding residence in a particular place are chiefly within the purview. *Ne manumittatur* and *ne prostituatur* are out of the question, because a fructuary had no power to manumit, and prostitution would be a breach of the general rule *ne abutatur* (1 15. § 1). A condition that the slave should be removed from his own city (*de civitate sua*) carried with it an exclusion from Rome also; and exclusion from a particular province carried with it exclusion from Italy also (D. XVIII. 7. 1 5; Cod. iv. 55. 15).

If a pecuniary penalty was bargained for (in a case of prohibited residence), Papinian at one time thought it could be enforced in an action on the sale, only if the stipulator was himself liable pecuniarily on the same condition. 'Revenge was not a good consideration'. But Papinian afterwards came over to Sabinus' opinion, that the penalty was claimable apart from this, because the price must be held to have been diminished by the insertion of the condition. In the Digest we have Papinian's retraction in XVIII. 7. 1 6. § 1 to which the original opinion is appended as 1 7 (Glück xvii. p. 210).

**alioquin, &c.]** 'otherwise (i.e. if he do not keep the conditions) he is not exercising his right of usufruct, as a good man would think right', and therefore is liable to the proprietary for any loss thereby incurred. See 1 9. pr.

**1 28.** Old gold and silver coins, so described, are evidently intended not for use as money, but for some other purpose, e.g. for ornament or curiosity. If they were money, they would not be susceptible of usufruct in the proper sense, but only of the quasi-usufruct sanctioned by a senate's decree (D. VII. 5). If however coins cease to be fungible, i.e. to be convertible at pleasure for the same quantity of the same genus, a proper usufruct is possible. They then become almost 'medals'. Thus *nomismata* with the special example of *filippi* (cf. Hor. *Ep.* II. 1. 234 *rettulit acceptos, regale nomisma, philippos*) are reckoned not as money, but as *aurum uel argentum signatum* (D. XXXIV. 2. 1 27. § 4). Cf. Suet. *Aug.* 75 *Saturnalibus... modo munera dividebat uestem et aurum et argentum, modo nummos omnis notae, etiam ueteres regios ac peregrinos* (Noodt I. cap. 4). A doubt may also have been felt whether such things have any proper 'use' or 'produce'. See below 1 41.

**quibus pro gemmis uti solent]** What the precise use 'in place of jewels' was we do not know. Doneau (*Comm.* x. 3. § 14) and others suggest use as buttons; Noodt (followed by Glück ix. 175) suggests collections of coins. Other uses are conceivable, e.g. insertion in metal cups (cf. Cic. *Uerr.* iv. 27, 28); or use as earrings, &c. But the point is quite immaterial. The material point is that the coins should be sought or used for their own sake as individuals, and not as mere representatives of value.

**solent]** i.e. 'men in general are wont'. Cf. *Lat. Gr.* § 1428.

**1 29. omnium bonorum us. fr.]** Two meanings of this sentence are possible: either that there is no part of a man's property of which he cannot bequeath the usufruct (cf. *omnium praediorum* 1 3. pr.; *omni fructuario* 1 25. fin.), or that a bequest of a usufruct in the whole of a man's



property is allowable. But the former meaning would be better expressed by *omnium rerum* as in D. VII. 5. l 1; l 3; XXXIII. 2. l 32. § 2. The latter is the true meaning; first because *bona* is a standing expression for a man's property as a whole (cf. D. L. 16. l 49; l 208; *bonorum possessor, bonorum emptor*; D. XXXVII. 1. l 3. pr. *bona hic, ut plerumque solemus dicere, ita accipienda sunt universitatis cuiusque successio*); secondly because the following clause (*nisi excedat dodrantis aestimationem*) is referable only to the property as a whole. Bas. translates πάντων τῶν πραγμάτων; but Steph. πάσης αὐτοῦ τῆς οὐσίας 'all his property'. The expression occurs in Cic. *Caecin.* 4. § 1 *usum et fructum omnium bonorum suorum Caesenniae legat. Omnium bonorum* is equivalent to *universorum bonorum* (l 34. § 2), *universarum rerum* (Ulp. XXIV. § 25); *totius patrimonii* (ib. § 32); *bonorum* (D. XXXIII. 2. l 24; l 37; l 43; XXXV. 2. l 69). An analogous use is seen in *societas omnium bonorum* (D. XVII. 2. l 1; l 3. § 1; l 52. § 17; § 18); *universorum bonorum* (l 63. pr.); *totorum bonorum* (l 67. § 1); *universarum fortunarum* (l 73). The two meanings are connected. If a usufruct is bequeathed in the whole of a man's property, there must be a usufruct or something analogous in each item of it, i.e. a usufruct *omnium rerum quas in cuiusque patrimonio esse constaret* (D. VII. 5. l 11), *omnium quae in bonis sunt* (D. XXXIII. 2. l 1); and due security must be given by the usufructuary not only for the restitution *in specie* of things not consumable but also for the restitution *in genere* of money and other things consumable.

In the content of a *us. fr. omnium bonorum* were included *nomina* i.e. debts due to the deceased, especially regular investments (*kalendarium*); and debts due from the deceased were first deducted (D. XXXIII. 2. l 24. pr.; l 32. § 9; l 37; l 43; cf. XVII. 2. l 3; L. 16. l 39. § 1; l 83; and next note).

*nisi excedat dodrantis aestimationem*] 'unless the value of the usufruct exceed the value of three-fourths of the testator's property'. Bas. strangely translates *dodrantis* τοῦ ὀκταονγκίου (i.e. *bessis*, 'two-thirds'), but Steph. has rightly τοῦ ἐναονγκίου. For the general provisions of the *lex Falcidia*, which are here alluded to, see note on l 5 (p. 45).

Stephanus raises the question, how the usufruct could possibly exceed three-fourths the value of the whole inheritance. He answers that the property may have consisted entirely in slaves and animals, which in the course of time would die or become worthless, so that the propriety would be worth nothing. But it is not necessary to resort to such suppositions to find a usufruct of the whole inheritance worth more than three-fourths the fee. In an extract from Macer (D. XXXV. 2. l 68) we have the rules on which the value of a usufruct was computed, viz. at a certain number of years' purchase of the annual value, the number varying with the age of the usufructuary at the commencement. The greatest number given is thirty years, and even if the usufructuary was a municipality, and therefore entitled to enjoy the usufruct for 100 years (D. XXXIII. 2. l 8), still the value was reckoned at 30 years' purchase only. Unless therefore the fee was reckoned as worth at least 40 years' purchase, the municipality would have

to suffer abatement of its usufruct, if the heir was to have his Falcidian fourth. 40 years' purchase presumes the rate of interest to be  $2\frac{1}{2}$  per cent. only, a rate of which an example is indeed found in the *tabulae alimentariae* (see note on l 7. § 2, p. 64), but 5 and 6 per cent. were more common rates, and both are also found in such calculations (see same note). In D. xxxv. 2. l 3. § 2 the value of an annuity is said to be such a sum as at 4 per cent. would yield the amount of the annuity, i.e. 25 years' purchase. And in Capit. Anton. P. 2, 4 per cent. is called the lowest rate of interest. Cf. ib. Alex. Sev. 21. § 2. At any higher rate than  $2\frac{1}{2}$  per cent. a legacy of a usufruct of all the testator's property to a municipality would have to suffer abatement. But, besides municipalities, a usufruct left to any one under the age of 20 years was reckoned by Ulpian at 30 years' purchase, and the same value was very commonly extended, according to Macer, when the age was under 30 years. If we assume a rate of 4 per cent., a usufruct of all the property left to any one under the age of 40 or 41 years would exceed in value three-fourths of the fee.

Several questions arise to which it is not easy to give answers. (a) If a usufruct and an annuity are left to a corporation, is the annuity to be valued at 25 years' purchase according to D. xxxv. 2. l 3. § 2, and the usufruct at thirty years' according to l 68. pr.? If interest be reckoned at 4 per cent. the present value of the fee simple is no more than 25 years' purchase, and therefore is not more valuable than the annuity reckoned as in l 3, and less than the usufruct reckoned as in l 68.

(b) Even where the period of usufruct is not fixed, but depends on the life or non-diminution of *caput* of an individual, the value of the reversion must be very small, if the life be young. In the case supposed in our text the heir gets nothing but the reversion, possibly very remote. Is this enough to satisfy the *lex Falcidia*, or practically to induce the heir to enter (cf. l 73. pr.)? In such a case and also in the preceding one, it seems reasonable to suppose that, if not by the law, still by the force the heir can put upon the legatee, the method of a division of the usufruct would be resorted to, and the heir would have his fourth or, if the reversion be taken into reckoning, at any rate, some share of the annual proceeds. Indeed it seems that those methods of calculation (l 3. § 2; l 68) are only intended, when there are several legatees, and some value must be put upon all, in order to estimate the whole amount bequeathed and make a fair proportionate abatement (cf. l 1. § 9).

(c) Suppose this done, is the value so set final, even if the usufructuary live longer than the estimated period, and thus practically get more than three-fourths, and the heir get less than his statutable minimum share of the inheritance? L 47, dealing with annuities, apparently decides that the estimate of value is merely provisional, and that in the case supposed the heir would eventually be able to claim reimbursement of the excess (cf. Arndts in *Rechts-Lex.* vi. p. 332), and the heir can in view of such a contingency demand previous security (l 1. § 16). An annuity

does not drop on *capitis deminutio* occurring to the recipient. But if a usufruct were in question, the opposite case might occur, and the fructuary might, in consequence of (say) 20 years being assumed for calculating the value of his interest, have suffered a larger abatement than was really required.

(d) In l 55 another mode is given for estimating the value, viz. what it would sell for, but we are not told when this method should be adopted. An intending purchaser, no doubt, besides the customary calculation of value would have regard also to the health and prospects of the fructuary or annuitant.

Keller (*Pand.* § 578) with others leaves to the judge the decision, according to the particular case, which principle of valuation should be adopted, and whether provisionally or absolutely. A variety of opinions are given in Matthiae, *Controvers. Lex.* Theil. II.; *Erbrecht* s. v. *Quarta Falcidia*, XIII. sqq.

The principle on which the scale given by Ulpian in l 68 is framed is not declared, but appears to be simply the probable length of life of persons of the ages named, and the interest of money seems not to be an element in the calculation. The present worth of the annuity is thus put considerably higher than it would be taken by a modern actuary. This was an error in favour of the heir, and, as the protection of the heir's interest was the object of the *lex Falcidia*, to err on this side was probably intentional. Two writers in the *Assurance Magazine*, Fred. Hendriks, Vol. II. p. 223 (1852); and W. B. Hodge, Vol. VI. p. 313 (1857)<sup>1</sup>, have, after careful examination of the table, come to this conclusion. Mr Hendriks compares it with Dr Price's table XLVI., giving the result of "the first deductions ever made on the value of life in a city by comparison of the deaths at all ages for a certain length of time, with the enumerated population living at corresponding ages and exposed to the risk of mortality." The table is based on the mortality at Stockholm from 1755 to 1763, and gives the expectation of life separately for males and females, which vary from one another by '3 to nearly 7 years. The mean, as Mr Hendriks points out, comes very fairly near to Ulpian's table. I give a table shewing this mean at different ages, and also some extracts from Willich's tables for comparison with the Roman tables.

In this table the number of years' purchase according to Ulpian and Macer, for each age not given, is the same as that of the next given younger age. The value (in the abstract, apart from special circumstances) of the reversion expectant on the death of the annuitant may be obtained in the modern (i.e. the Carlisle) table by deducting the given number of years' purchase from 25 years, if interest be reckoned at 4 per cent., and

<sup>1</sup> I am indebted for these references to my friend Mr Geo. Humphreys, Actuary of the Eagle Insurance Company, who has also calculated for me the Stockholm Expectations in the subjoined table for the ages of 41—44, and 46—49, which are not given in Mr Hendriks' paper.



Age completed	Years' purchase according to		Expectation of Life (mean of males and females)		Years' purchase according to Carlisle table for Annuity on Life.	
	Ulpian	Macer	Stockholm	Carlisle	4 per cent.	5 per cent.
Birth	30	30	16·17	38·72	14·28	12·08
5	30	30	34·08	51·25	19·59	16·59
10	30	30	33·00	48·82	19·58	16·67
15	30	30	30·08	45·00	18·95	16·23
20	28	30	26·93	41·46	18·36	15·82
25	25	30	24·10	37·86	17·64	15·30
30	22	30	21·70	34·34	16·85	14·72
35	20	25	19·60	31·00	16·04	14·13
40	19	20	17·43	27·61	15·07	13·39
41	18	19	17·03	26·97	14·88	13·24
42	17	18	16·64	26·34	14·69	13·10
43	16	17	16·25	25·71	14·50	12·96
44	15	16	15·86	25·09	14·31	12·80
45	14	15	15·47	24·46	14·10	12·65
46	13	14	15·08	23·82	13·89	12·48
47	12	13	14·70	23·17	13·66	12·30
48	11	12	14·31	22·50	13·42	12·11
49	10	11	13·92	21·81	13·15	11·89
50	9	10	13·53	21·11	12·87	11·66
55	7	5	11·59	17·58	11·30	10·35
60	5	?	9·57	14·34	9·66	8·94
65	5	?	7·89	11·79	8·31	7·76
70	5	?	5·98	9·18	6·71	6·33
75	5	?	4·24	7·01	5·24	4·99

from 20 years if interest be reckoned at 5 per cent.: e.g. the reversion expectant on death of a man aged 30 is worth 8·15, or 5·28, years' purchase respectively. (In practice modern actuaries adopt a different mode of calculating the commercial value of a reversion.)

**est uerius**] 'is the better opinion'. A common expression: cf. Gai. III. 183; 193; 194; IV. 1; 60; D. XLI. 2. 11. § 16, &c. Some doubt is implied: what was the point of the doubt here? Probably whether all parts of the inheritance were capable of being subjects of a usufruct. At least the same expression is used in the same or a similar discussion in D. VII. 5. 1 3 *Post quod (senatusconsultum) omnium rerum usus fructus legari poterit. An et nominum? Nerua negauit: sed est uerius, quod Cassius et Proculus existimant, posse legari.*

1 30. **binas aedes**] 'two houses', the distributive numeral being used, because *aedes* in this sense ('set of hearths' or 'chambers' = 'house') has no singular (*Lat. Gr.* I. p. 443, v. 3; cf. § 331). The same expression is found in D. VIII. 2. 1 10; 1 35; 1 36; 4. 16. § 2, &c. In D. VIII. 4. 16. pr.; XXXIII. 3. 1 4 we have *duas aedes* in same sense, as is shewn by *alteras*, not *alteram*, following in both places.

**posse heredem**] The case put is one of a simple legacy of the usufruct, without the testator imposing a servitude on the other house, as he

might have done either by express words (supr. l 19. pr.) or by necessary implication (D. XXXIII. 3. l 1).

**Marcellus scribit]** The passage of Marcellus referred to is in D. VIII. 2. l 10.

**alteras altius tollendo]** Every person is able to do what he likes in raising or lowering or altering his own house, unless his house is subject to a servitude in favour of another. *Cum eo, qui tollendo obscurat vicini aedes, quibus non serviatur, nulla competit actio* (D. VIII. 2. l 9; cf. Cod. III. 34. l 8; 19). The servitude *ne aedes altius tollantur* is spoken of as a *ius non tollendi*, i.e. a right in the dominant house, that the neighbour should not raise his house. But a *ius tollendi* is also spoken of (Gai. II. 31; D. VIII. 2. l 2, &c.) as a servitude (and similarly a *ius non auertendi stillicidii* as well as a *ius auertendi*). It is not easy to account for what is apparently part of the regular rights of an owner being treated as a servitude. Two explanations are given, (1) that the *ius tollendi* is a special privilege by which a neighbour is bound to waive in favour of another the claim he has by any general restrictions on buildings in towns to prevent such higher erections. (So Wächter, *Pand.* § 158, Beil. II. and others.) (2) That after a house has been subject to a servitude *ne altius tollantur*, it can only recover its freedom by a contrary servitude being imposed on the dominant house. Hence the *servitus non tollendi* is removed by a *servitus tollendi*. (So Vangerow, § 342, n. 3, and others.) Neither explanation is very satisfactory.

**officere luminibus]** The ms. reading *obscurare luminibus* must be wrong, as the verb is transitive. The origin of the error is clear, if the extract from Marcellus' Digest in D. VIII. 2. l 10 is looked at. In the statement of the question to Marcellus the words are *heres aedes alteras altius tollit et luminibus tuis officit*. In the answer of Marcellus the words are *non dubium est quin heres alias possit altius tollendo obscurare lumina legatarum aedium*; and lower down *sed ita officere luminibus et obscurare legatas aedes conceditur, ut non penitus lumen recludatur sed tantum relinquatur quantum sufficit habitantibus in usus diurni moderatione*. Some copyist has confused the two phrases *officere luminibus* and *obscurare lumina*. Either will do in our passage. I prefer *officere luminibus* because *obscurare* is so likely to have been substituted by some one who sees it occur twice in our passage immediately after. Were it not for the extract from Marcellus, *obstruere* would be an easy correction for *obscurare*. See above l 13. § 7, and note there (p. 112). Perhaps, however, *obstruere* is more suited to actual blocking up of windows than to the prejudicial effect of other erections, and *officere* is perpetually used in the Digest in the sense required. Bas. has σκοτίζειν τὰ φῶτα which looks like *obscurare*, but Steph. ἐμποδίζειν τοῖς φῶσι with σκοτισθέντα used afterwards, which I take to indicate that Steph. read *officere luminibus*.

The comparison of our passage with the extract from Marcellus shows

that when a writer says *Marcellus*, &c. *scribit*, we cannot conclude that he gives the exact words of the author referred to. The substance is here accurately given.

**quoniam**, &c.] The principle is that the heir must not neutralize the gift of his testator by rendering the house of the fructuary uninhabitable, but, subject to this, he can do with his property what he chooses.

**quod usque adeo temperandum est**] 'which right of raising his own house and obscuring his neighbour's must be so moderately exercised that, &c.'

1 31. (a) This law is ludicrously out of place between 1 30 and 1 32, if the connexion of the thought be regarded. But the place was really determined by totally alien considerations. It is an extract from Paul's 10th book on Sabinus and consequently comes after the extracts from the third book.

(b) The purport of the law is that '*ex re fructuarii*' includes not merely the fructuary's own goods managed by the slave, but also the slave's *peculium*, whether it consisted of gifts from the fructuary or of money allowed him to use, or of the slave's savings. Legally the *peculium* still remained part of the property of the fructuary: practically it was the slave's, and the acquisitions made out of this *peculium* would belong in the same way. This double aspect of the *peculium* shewed itself from several points of view. As regards dealings with third parties it was the slave's property and was answerable for the slave's debts; *quasi patrimonium liberi hominis peculium serui intellegitur* (D. xv. 1. 1 47. fin.; 1 32. pr.). He could even have business with his master as if there were no domestic relation between them; purchase and sale, letting and hiring, pledge and suretyship, gift and loan, all might take place between the slave and his master or third party; just as between one *paterfamilias* and another (ib. 1 47. § 6; 1 49; cf. xxxiii. 8. 1 22. § 1; xl. 7. 1 14). On the other hand, the *peculium* existed, both as a whole, and as regards any particular things in it, only so long as the master willed (ib. 1 4. pr.; 1 8). But he could not withdraw it so as to defraud the slave's creditors (1 21). He had however the right as between himself and other creditors of the slave, of deducting payment in full of his own debt, unless the slave was carrying on a particular trade with the master's knowledge. In that case the master could only claim his proportion (D. xiv. 4. 1 1. pr.; 1 5. § 7). Actions for and against the slave were brought in the master's name (xv. 1. 1 44). As the slave might also be acting not for himself but on behalf of his master, this fact if proved made the master responsible, not merely to the limit of the *peculium* but as for a debt of his own. If the master's own estate had been enriched, the suit was *de in rem verso* (xv. 3); if the debt was on the master's guaranty, it was *quod iussu* (xv. 4); if the slave was merely the manager of a trade carried on for his master, or was the captain of his master's ship, the master was



of course wholly responsible in the *actio institoria* (xiv. 3), or *actio exercitoria* (xiv. 1). But where the slave was concerned for himself, the action was in form against the master *de peculio* (xv. 1), or if the matter related to some special trade of the slave's, it was *actio tributoria* (xiv. 4). On the death of the slave the *peculium* fell back as it were into the master's property, unless he allowed it to go to the slave's relatives or assignees. On his being set free or alienated, the *peculium* remained with the master, unless expressly stated to accompany the slave (D. xviii. 1. 1 29; xix. 1. 1 38. pr.; xl. 1. 1 6). The right of action however remained with the creditors for a year (D. xv. 2. 1 1). If a slave was in usufruct, he might have a *peculium* belonging legally to the proprietary and another belonging to the fructuary (1 2); but the creditors were not bound by this distinction, and if the one *peculium* was not sufficient, they could come upon the other (xv. 1. 1 19; 132. pr.; 137. § 3). The proprietary and fructuary could enforce their claims on the slave, each against the other (ib.).

(c) The slave was not justified in squandering the *peculium*, and therefore was held not competent to do so; he could not make presents, even though he had expressly (cf. 17. § 1) free management allowed him (D. xxxix. 5. 1 7; cf. xiv. 6. 1 3. § 2). It is indeed doubtful whether and how far *libera administratio peculii* really gave fuller powers than those of ordinary prudent management (Mandry *Familiengüterrecht* II. pp. 103—106). But management would include power of alienation in the ordinary way of business, and such alienation would be valid (D. xv. 1. 1 48; vi. 1. 1 41. § 1).

(d) The sources of the *peculium* may conveniently be referred to the heads named in our text. 1. Gift by the master (in our case represented by the fructuary). The gift must be executed in the usual way by delivery or definite separation of the thing given (D. xv. 1. 1 8). In the case of a slave in usufruct or the property of more than one owner, the gift may be made with either of two intentions, i.e. either that it should form part of the slave's *peculium* belonging to the giver, or that it should pass either to the fructuary, or to the proprietor or (partly) to the coproprietor (above 1 22; xli. 1. 1 37. § 1). 2. The slave may have received the thing from elsewhere—a gift, or legacy, or inheritance, or profit on commercial transactions, or hire for his services, &c. Legally this becomes at once the property of his master (or under circumstances of the fructuary, &c.), but the master may allow him to retain it as part of his *peculium*, 17. § 1; 1 49. (cf. Mandry, pp. 123—125). 3. The slave may save something out of his master's payments to him for clothing, or food, or lodging, &c. (cf. xv. 1. 1 39; Seneca, *Ep.* 80. § 4 *peculium suum, quod comparauerunt uentre fraudato, pro capite numerant*). From whatever source it was acquired, the *peculium* was often applied to purchase the slave's liberty. Legally, of course this only meant that the master (or his heir) set him free, but retained part or the whole of his *peculium*, D. xl. 1. 1 4. pr.; xxxiii. 8. 1 8. § 3; § 7. On the bequest of a *peculium* see D. xxxiii.

8. There is a good account of the *peculium* in Pernice's *Labes*, i. p. 121 sqq. See also Marquardt *Priv. Alt.* p. 160; Mandry, l. c.

**ei]** sc. *seruo*.

**eius]** sc. *fructuarii*, dependent on *rerum*.

**compendii]** depends on *quod*.

1 32. **unas aedes]** 'one house' the plural of *unus* being used in such expressions, only where a plural substantive expresses what is conceived as one thing; cf. *binas aedes* l 30, and *Lat. Gr.* i. p. 442. The words '*quas solas habet*' are added merely to emphasize *unas*, 'one house only'. The same qualifications apply also to *fundum*.

**tradit]** Perhaps originally '*mancipat*'. See Gai. ii. 30; 33; Vat. Fr. 47, and note on l 3. pr. (p. 38). For the general law see D. viii. 4. l 6.

**excipere]** 'except from the conveyance', 'reserve'. Cf. infr. l 36. § 1; D. xix. 1. l 21. § 6 *qui domum uendebat, exceptit sibi habitationem donec uiueret*; xviii. 4. l 2. § 12 *Si uenditor hereditatis exceperit seruum sine peculio*; ib. 1. l 77; xix. 1. l 17. § 6, &c. In the same sense are used *detrahere* (below l 36. § 1; Gai. ii. 33); *deducere* (Gai. l.c.; Vat. Fr. § 47); *recipere* (below l 36. § 1, where see note p. 208).

**id quod personae, non praedii est]** This emphatic expression is perhaps due to the fact that Pomponius' 33rd book related to rights and easements connected with land. At least all the fragments from it as collected by Hommel (except one, D. xxii. 5. l 11) have this connexion. But such rights could be created only in favour of another estate; and that estate must be the creator's own, not a stranger's. Consequently a man delivering the only estate which he owned, could not reserve any predial right, for he had no estate left which it could serve (D. viii. 4. l 1. § 1; l 6. pr.). But a personal servitude he might reserve. Such are *usus fructus* and *usus, habitatio* being only a special form of *usus*, and *pastio*, as here used, a special form of *ususfructus*.

**pascere]** A *ius pascendi* is mentioned among rural servitudes in D. viii. 3. l 1. § 1; l 3. pr.; l 4; l 6. § 1. In l 3 the pasturage is clearly a predial servitude *ut boues per quos fundus colitur in vicino agro pascantur*. In l 4 Papinian says, if the estate of the owner of the servitude is mainly a cattle-breeding farm, the *ius pascendi* and *ius ad aquam appellendi* are servitudes to his estate rather than to himself, but that if the testator's words described a particular person as entitled, the heir or purchaser (of the estate) will not have a right to the servitude. Stephanus draws a distinction between a herd kept for the value of its produce and one kept merely to provide manure for an estate. A right of pasturage in the former case is personal, in the latter predial. In our passage it cannot be predial, for the servitude owner has no estate: he has parted with the property in a mountain pasture, retaining to himself merely the right of pasturing his herd there. Pasturage applies to sheep, goats, swine, oxen, horses, asses and mules (cf. Varr. *R. R.* ii. 1. § 12, § 16).

**inhabitare]** A right of residence differed little as regards its contents from *usus domus* (*effectu idem paene est* D. VII. 8. 1 10. pr.). Presumably therefore the person entitled could reside with his relations and dependents, could receive guests, could even let part if he continued to reside there himself. He could not give (*donare*) the right to others. If nothing was said, the right was for life. It did not however pass to the heir, nor on the other hand was it lost by non-use or by *capitis deminutio* (ib. also § 3). Reservation of right of residence for the vendor or others on sale of a house is mentioned in D. XIX. 1. 1 13. § 30; 1 21. § 6; 1 53. § 2.

**perciperetur]** This ought to be *percipiatur*. In a mountain pasture (*saltus*) the principal produce (*fructus*) would be grass, and would be gathered (*percipiatur*) by the sheep or cattle turned in to feed.

**temporali]** The inferior mss. have *temporalis* which Mommsen approves, though Stephanus supports the Florentine reading. As a word beginning with *s* follows *temporali* the proposed change is very easy, and properly no doubt the restriction of time affects *habitatio* not *exceptio*. But a reservation of a temporary right of residence might so readily be spoken of as a temporary reservation that I see no necessity for deserting the Florentine reading. Of course this *temp. exceptio* has nothing to do with the use of the words for a 'dilatatory plea', e.g. D. XLIV. 1. 1 3; L. 16. 1 55. *Temporalis habitatio*, 'a right of residence for a time', is an expression not found elsewhere. The ordinary phrase would be *habitatio ad tempus*.

There were two or rather four questions discussed relating to temporary restrictions on servitudes: whether they could be established *ad tempus* and *ex tempore*, i.e. to last till a fixed day, and to commence from a fixed day, not the present moment; and again whether with such restrictions they could be reserved as well as directly constituted. It was agreed that they could be bequeathed (*per vindicationem*) both *ad tempus* and *ex tempore*: further that *inter vivos* they could be constituted *ad tempus*, and Paulus thought they could be reserved *ad tempus*, but that they could not be constituted, and he doubted whether they could be reserved *ex tempore*. Pomponius thought they could not be reserved *ad tempus* (Vat. Fr. 48—50). Sabinus held that in strict law none of these were possible, but that by agreement (*pactum*) they could practically be done. And this opinion reported by Papinian, is adopted in the Digest (VIII. 1. 1 4. pr.), and becomes more important in consequence of Justinian's allowing agreement to be a legitimate and effectual way of establishing a servitude. See note on 13 (p. 38). The precise mode of reconciling Pomponius' view as reported by Paulus in the Vat. Fr. with our own passage from Pomponius is not clear. Tribonian has probably altered our passage.

133. pr. When a man bequeaths the propriety and the usufruct he bequeaths the whole of the thing, and the heir has nothing in it. If the intended fructuary die before the inheritance is entered on, the bequest of the usufruct fails, and the legatee of the propriety becomes effectual owner. If the legatee of the usufruct had died after the legacy was vested, the case



would have been the same, except for the temporary separation of the usufruct. The testator's heir gets nothing in either case (apart of course from the question of the Falcidian law). A stronger case is put in D. VII. 6. 1 4. There a man bequeaths an estate less the usufruct, and bequeaths the usufruct to another on condition. What becomes of the usufruct in the time before the condition takes effect? Is it with the heir or with the legatee of the estate? Julian decided that notwithstanding the words *detracto usufructu* the heir took nothing, the proprietor would have the usufruct till the condition existed. It must be remembered that if such words had not been used, the legatee of the estate would have been entitled to the usufruct jointly with the legatee of the usufruct (D. XXXIII. 2. 1 19), which would have been contrary to the testator's intention.

§ 1. **non partis effectum optinere**] 'in some cases the usufruct, it is agreed, is not treated in law as a part (of the thing) is treated'. Bas. has οὐκ ἔοικεν ἡ χρῆσις τῷ μέρει τῆς δεσπορίας. Similarly Cyrillus. Mommsen suggests that we should read *non partis proprietatis*; and the inferior MSS. have, instead of *non partis*, either *proprietatis* or *non proprietatis*. I do not think any change is necessary, but take *partis* to be *partis rei*. A usufruct is not like a part, for a part follows in some cases the fate of the other part, whereas a usufruct is independent. The question is not here, how far the usufruct can be regarded as part of the ownership (see note on 1 4. p. 42). In a practical sense it is so: the usufructuary actually enjoys many of the rights which the proprietor would otherwise enjoy, and in particular has the actual possession and produce of the thing. But he is not a part owner, nor is he owner of part of the thing. The owner's rights apply equally to all parts of the thing owned, and his title to one part is the same as his title to another part. A usufruct is not a whole in this sense; it is rather a series of acts of enjoyment and the loss of one such act does not necessarily preclude his title to after acts. *Ususfructus cottidie constituitur et legatur, non, ut proprietas, eo solo tempore quo vindicatur* (D. VII. 2. 1 1. § 3).

Cases in which a usufruct 'has the effect of a part' occur, e.g. D. XXX. 1 82. §§ 2, 3.

**si fundi uel fructus portio petatur**] The chief of the inferior MSS. given by Mommsen has *si fructus uel fundi portio petatur*, and others seem to have similar readings. Such a reading, comparing the *fructus* with a *portio fundi*, is naturally to be expected after the previous sentence, and might be suggested (without necessity) by the last words of this law; but the clause *et absolute* &c. seems clearly suited to a *pars fructus* as well as a *pars fundi*. From the words *pars altera quae adcreuit* it would appear that the *portio* here is the whole of the thing at the time of the action, but a portion only of what it subsequently became.

**absolute secuta**] 'if the verdict is against the claim'. *Absoluere* is the regular opposite of *condemnare*, and the two words were the standing conclusion of the formulae, e.g. *si paret rem A. Agerii esse, iudex N. Negi-*

*dium condemna: si non paret, absolute*; cf. Gai. iv. 39; 86; 114, &c. A similar expression to ours is in D. XLVI. 1. l 52. § 3 *Plures eiusdem pecuniae credendae mandatores, si unus iudicio eligatur, absolutione quoque secuta non liberantur, sed omnes liberantur pecunia soluta.*

**adcreuit]** Accrual ('growth on' to a thing) is much narrower than accession (on which see note on l 9. § 4. p. 71), and in general is applied to a different class of cases. When more than one person have rights to the whole of a thing, the concurrence limits the rights of each to a proportionate share only, but if some of the persons so entitled lose or do not claim their share, such share accrues to the others or other.

Thus (a) if one of several heirs die before the testator, or does not enter, or is made heir on a condition which does not take effect, his share accrues to the heir or heirs who do enter (cf. e.g. D. XXVIII. 5. l 50. § 3; XXIX. 2. l 31; l 53. § 1; l 67; XXXV. 1. l 26. § 1).

Similarly (b) *bonorum possessores*; cf. D. XXXVII. 1. l 3. § 2; l 4 *In bonorum possessione sciendum est ius esse adcrescendi: proinde si plures sint quibus bonorum possessio competit, quorum unus admisit bonorum possessionem, ceteri non admiserunt, ei qui admisit adcrescant etiam hae portiones quae ceteris competere, si petissent bonorum possessionem* (cf. ib. 8. l 1. § 12).

(c) Legatees *per uindicationem*; Gai. II. 199 *Illud constat si duobus pluribusue per uindicationem eadem res legata sit siue coniunctim siue disiunctim, et omnes ueniant ad legatum, partes ad singulos pertinere et deficientis portionem collegatario adcrescere. Coniunctim autem ita legatur 'Titio et Seio hominem Stichum do lego'; disiunctim ita 'L. Titio hominem Stichum do lego, Seio eundem hominem do lego'.* On the other hand in a legacy *per damnationem*, if *disiunctim*, the heir had to give to one the slave or thing, and to the other the value; if *coniunctim*, each had a share only, but if one partner failed to take his share, it did not accrue to the other partner, but remained with the heir. In Justinian's time accrual depended not on the form of words but on the intention of the testator to give one thing among several persons, but so that, if the others make default, one or more of them, qualified and claiming it, should have the whole to himself or themselves (cf. D. XXX. l 33 &c.; XXXV. 1. l 26. § 1; l 30).

(d) Children, not sons, passed over in a will. If a son *in potestate* was passed over in silence, the will was invalid (Gai. II. 123); but if daughters or grandchildren were so passed over, the will was not invalidated, but *praeteritae istae personae scriptis heredibus in partem adcrescunt, si sui heredes sint, in uirilem, si extranei, in dimidiam*, i.e. if three sons were named heirs and a daughter passed over, the daughter becomes heir to a fourth; if three strangers were named, the daughter becomes heir to a half, (ib. 124).

(e) Partners, in certain cases. *Communem seruum unus ex dominis manumittendo partem suam amittit eaque adcrescit socio* (Ulp. I. § 18).

(f) Ground formed by the gradual deposit from a river accrues to the owner of the ground next to which it is deposited (see note on l 9. § 4

*alluvio*, p. 72), cf. D. XIX. 1. 13. § 14 *Si Titius fundum...uendiderit et...decem iugera alluvione adcreuerint*, the purchaser has them. In this last case the word *adcrecere* is used literally, and the case has not the characteristics of the others. In principle it falls under the class of accessions rather than under that of accruals. It serves just below to point a contrast.

A usufruct is the subject of accrual in two cases (*g*) from the usufructuary to the proprietary and (*h*) from one usufructuary to another. It accrues to the proprietary when there is no usufructuary entitled, and then follows the ownership just as accretions from water follow the principal land. *Si nuda proprietas pignori data sit, usus fructus qui postea adcreuerit, pignori erit: eadem causa est alluvionis* (D. XIII. 7. 1 18. § 1). It accrues to another usufructuary when the intention of the testator was not to give them definite shares or specific parts of the thing but to make them joint usufructuaries, each being entitled to the whole. Then the rights of each being only limited by the concurrent rights of the other, on the one dropping, the survivor, no longer impeded, can exercise his rights over the whole. Whether the usufruct be *legatus coniunctim* or *disiunctim* they must, in order to have the right of accrual, be entitled not to a part of the usufruct but to the whole. *Totiens ius adcrescendi est, quotiens in duobus qui (usufructum) solidum habuerunt, concursu diuisus est* (Vat. Fr. 79; D. VII. 2. 13. pr.).

It will have been seen that in the four first-mentioned cases the property is not vested before the accrual. When it is vested, the property held in common can be divided by a partition suit, and whether divided or not the shares pass to the respective heirs. The four latter cases are different both from the former and from one another. In the fifth case (*e*) the act of the manumitter is treated as an abandonment of his rights: in the sixth (*f*) nature makes the addition to the property irrespective of who may be the owner. In the last two cases the right of usufruct is concerned, and that is personal and never passes to the fructuary's heir.

**in lite proprietatis]** 'in a suit for the ownership', i.e. when, as said above, *portio fundi petitur*.

**iudicatae rei exceptionem]** (*a*) A defeated plaintiff cannot be allowed to bring his action over and over again; nor a defendant to bring an action on the same matter against the successful plaintiff. When an appeal is allowed, the judgment in the suit cannot be considered given until the appeal is finally settled. After that the matter is *res iudicata*. According to the law under the formulary system, in most actions the praetor allowed a defendant, in a suit on a matter which was already decided, to plead that it was *res iudicata*, and this plea, if established, was fatal to the plaintiff's proceeding. There was one class of actions in which the plaintiff was stopped sooner: he was not allowed a formula at all. This class of actions consisted of those which were tried before a single judge (not *recuperatores*) in the city of Rome between Roman citizens on a



claim of strict civil law arising out of an obligation (*si legitimo iudicio in personam actum sit ea formula quae iuris civilis habet intentionem* Gai. iv. 107). Such an obligation was held to be transformed by joinder of issue (*lite contestata*) into a submission to the issue, and by the judgment either to be extinguished altogether or to be transformed into a new obligation to satisfy the judgment (Gai. iii. 180. 181). Hence a plaintiff cannot even theoretically (*ipso iure*) bring an action again on the matter. In all other cases he can theoretically, but not practically: the plea 'matter is decided' bars his chance of success. After this formulary system was abolished, and of course therefore in Justinian's time, the *exceptio* was used in all cases.

(b) What then was *res iudicata*? Julian gave the rule that this plea was a bar whenever the same question is brought again between the same parties, even though the kind of suit be different (*quotiens inter easdem personas eadem quaestio reuocatur uel alio genere iudicii* D. XLIV. 2. 1 7. § 4). What is the same question is not always easy to determine. But a suit for a part was barred, if a suit for the whole had been decided, whether the part was real, or ideal, or whether it was a definite place, actually part of an estate which as a whole had been the subject of a suit decided. But the timber of a house or the trees or stones on an estate might be the subject of a suit to which a decision on the house or estate as a whole would not be a bar (ib. 1 7. pr. § 2). Fruits, again, are distinct from the estate; they may have come into being since the decision and stand probably in a different position (1 7. § 3). A usufruct is distinct from the property, except when it belongs to the owner of the property; then it is merged; so that a suit for the usufruct as belonging to the property and brought by the owner is a different suit (because really a suit for a different ownership) from a previous suit brought by the same person while entitled to the usufruct but not owner of the property. The usufruct in the earlier suit was a usufruct attached to the person of one who was not proprietor, the latter is a suit for the establishment of the proprietor's full rights over the property against a person claiming a separate usufruct (1 21. § 3). Again, a person who has a part of a usufruct claims against his co-usufructuary the whole, and is defeated. The co-usufructuary dies or 'has his head broken'; the decision in the previous suit is no bar to the surviving usufructuary claiming this accruing share; *non portioni sed homini adcrevit* (1 14. § 1), i.e. it does not become his because it has been added in some way to the previous share, but is added to that share because it belongs to him equally with that. He had (it is assumed) originally the right to the whole, so far as no other person with equal rights thereby limited his actual enjoyment. This other person having dropped away, his right over the whole is unimpeded. The argument and language are the same as in our passage. The result of this was that the co-usufructuary retained his right to the accrual, even though he had lost by non-use his right of usufruct so far as his first share

was concerned (D. VII. 2. l 10. pr. ; 4. l 14 ; l 25), his right to the other share having been retained through his co-usufructuary exercising his right. See also Arndts in Glück XLVIII. p. 134 sq.

**uelut alluuiio]** On alluvion see note on l 9. § 4 (p. 72). The accrual of a part of a usufruct to one of two co-usufructuaries is not like alluvion : the accrual of the usufruct to the propriety is more like alluvion, and is so described in D. XIII. 7. l 18. § 1 quoted above (in last note).

**l 34. pr.** With this compare D. VII. 4. l 2. pr. and § 3. There three cases are mentioned in which a usufruct is bequeathed to two persons in alternate years :

(a) *Duobus separatim alternis annis*, i.e. *Titio usumfructum alternis annis do lego, Maevio eundem usumfructum alternis annis do lego*, in which case by the order of mention the testator is presumed to have settled which should begin. Then the usufruct is away from the propriety continuously, but alternates from one fructuary to the other, year and year about.

(b) *Duobus simul alternis annis*, i.e. *Titio et Maevio simul alternis annis usumfructum do lego*. Then the usufruct is away only every other year, the two fructuaries having it one year, and the proprietor the next, and so on.

(c) *Duobus singulis alternis annis*, i.e. *Titio et Maevio usumfructum singulis in alternis annis do lego*, 'to Titius and Maevius each I bequeath the usufruct, &c.' where (I suppose) the testator is presumed not to have settled the order of enjoyment by the order of mention. Then if they both claim the same year, they neutralize one another ; as the testator by saying *each* shewed that they were not to take together : if this difficulty be got over (so I take *si ea*, i.e. *uoluntas testatoris, non refragabitur*), then they will be in the same position as if the usufruct had been left them *simul*. In either case the usufruct will be away from the propriety only in alternate years. But if they select different years then the case will be the same as (a). In none of these cases will the one co-fructuary acquire by the death of the other more than the sole enjoyment in alternate years.

**potest dici priori Titio]** i.e. the first named is to have first enjoyment. *Potest dici* is an expression implying considerable doubt. In D. XL. 5. l 24. § 17 the case is put of a person being asked in a will to set free some of his slaves, and a sum of money being left to compensate him, but not sufficient to pay for all. *Quis ergo statuet qui potius manumittitur ? utrumne ipse legatarius eligat quos manumittat, an heres a quo legatum est ? et fortassis quis recte dixerit ordinem scripturae sequendum : quod si ordo non pareat, aut sortiri eos oportebit ne aliquam ambitionis uel gratiae suspicionem praetor subeat, aut meritis cuiusque allegatis arbitrari eos oportet* (where the last words are difficult. Do they mean 'they must submit to arbitration' ? or the praetor must decide them = must elect those to be freed ? but cf. l 13. § 1. p. 98). So under the *lex Fufia Caninia*, if the slaves were named, so many in that order were set free as the law permitted : if they were not named, but the testator professed to free all and

the total number was in excess of what the law allowed, none became free (Gai. i. 46. and Epit. ad loc.). See also D. xxxi. l 77. § 32.

**si duo eiusdem nominis**] When a legacy or inheritance was left to a person by name and there are several of that name, they might adduce proof as to which was meant by the testator (D. xxxv. l 1 33. § 1; xxviii. 5. l 63. (62). But if it was still doubtful, the gift failed altogether (xxxiv. 4. l 3. § 7; 5. l 10. (11) pr.; l 27; xl. 4. l 31). The heir was however at liberty to pay the legacy to which he chose, and could then protect himself by taking an engagement from the favoured claimant to take the risk and cost of a suit from the disappointed one (D. xxxi. 8. l 3): see Arndts in Glück's *Pand.* xlvi. p. 448.

**nisi consenserint**] For other cases of consent to remove colliding claims Cujac. (*ad hanc legem* III. 1091) quotes D. viii. 3. l 28; xxx. l 84. § 6; § 13; xxxviii. l. l 23. § 1. All these, like our passage, are from Julian. See also D. x. 2. l 25. § 17. For the use of the lot Bernstein (*Z. R. G.* xvii. 192) adduces D. v. l. ll 13, 14; x. 2. l 5; Cod. vi. 43. l 3.

**inuicem sibi impedimento erunt**] 'they will stand in one another's way', i.e. the bequest will drop. The mss. have *impedient*, but a dative with *impedire* is found nowhere, I believe, except in Varr. *L. L.* ix. § 20 *novitati non impedit vetus consuetudo*. In the similar passage D. vii. 4. l 2. § 3 we have *si consentiant in eundem annum, impediuntur, quod non actum videtur ut concurrerent*; and again *si concurrere uolent, aut impediunt inuicem*. *Impedire* with accus. is common, see D. xxxviii. 6. l 1. § 4; § 7. So also is *impedimento esse* with the dative, cf. Lat. Gr. II. p. xlvii. It is possible that the word used by Julian was *obstabunt* (cf. D. xxviii. 5. l 44 Paul *inuicem enim eos sibi obstaré*). The Greek commentators on this passage are lost.

**eo anno quo frueretur**] 'in the year in which he had the usufruct', i.e. in any of the alternate years.

**interim**] 'for the time', 'meantime'. The expression is framed in reference to the following supposition of his afterwards parting with the propriety.

**legatum non habebit**] 'he will not have the separate usufruct which was bequeathed to him'. It is merged in the propriety so long as he has the propriety and it is his turn for having the usufruct, but, on the year expiring, the usufruct, as it were, revives again in Maevius, and Titius for that year has only the bare propriety. It would however be more correct to say that such a bequest should be viewed as a series of bequests, each of which vests only at the commencement of the year, so that the merger affects the usufruct for that year or part of a year only, without being any bar to the existence of the usufruct in subsequent years. Cf. D. xxxiii. 2. l 13 *Cum usus fructus alternis annis legatur, non unum sed plura legata sunt*; vii. 3. pr.; 4. l 28; xxxvi. 2. l 12. § 1. Whether in subsequent years he will have the usufruct or the full right of ownership, depends on whether he has, by the time when his turn comes again, parted with the ownership or not (cf. D. xxxvi. 2. l 23).



**quia]** This by way of proof introduces another case, in which a merger is averted by the bare ownership being parted with before the usufruct becomes vested.

**si sub condicione &c.]** A legacy whether of a usufruct or anything else made on condition does not vest till the condition is realized (D. xxxvi. 2. 1 5. § 2). When this occurs, then the capacity of the legatee to take comes in question and not till then (ib. 1 5. § 7; 1 14. § 3). Consequently the fact, that while the condition was still in suspense the legatee held for a time the bare ownership, does not affect the legacy. If he had continued to hold it, the usufruct would on the condition being fulfilled come to him indeed, but then be at once merged in the ownership, and thereby be extinguished absolutely, so that if in any way he lost the ownership he would not retain the usufruct. This is illustrated by D. vii. 4. 1 17. There a man (Maevius) has the usufruct bequeathed to him absolutely, while the bare ownership is bequeathed to Titius on condition. Maevius acquires the ownership (subject of course necessarily to the condition) from the heir and by this act merges the usufruct in it. The condition is fulfilled. Titius becomes proprietor, and, as the usufruct no longer exists separately, becomes proprietor with full rights. Similarly D. xl. 4. 1 6. The owner of a slave makes his will, appointing the man who has the usufruct of the slave his heir, but giving freedom to the slave on a certain condition. The fructuary becomes heir: his usufruct is therefore merged in the ownership: the condition takes effect, and the slave thereby gains his freedom at once. So D. xxxi. 1 76. § 2. Again vii. 4. 1 27. A slave commits some offence against the man, in whose usufruct he is, which gives the fructuary a claim against the owner. The owner surrenders him *noxæ* to the fructuary. The usufruct is merged, and henceforth gone. Consequently (if Inst. iv. 8. § 3 apply, see p. 136 o) the slave by working off the amount of the damage becomes free. Whether *liberabitur* in this 1 27 be taken of the slave being no longer subject to the fructuary *qua* fructuary, as Bas. (*φθείρεται ἡ χρῆσις*) and Pothier take it (and this seems best), or of the usufructuary being freed from all obligation to the (former) owner, as Glück (ix. p. 355 n. 82) and the German translators take it, or of the eventual freedom of the slave (on which see note on 1 17. § 2 *noxæ* § o. p. 136), does not make any difference for our point. Of course merger affects only the particular usufruct or servitude in question: any owner in full rights can create such a usufruct or servitude afresh. For cases in which merger is revoked see below 1 57.

**ad legatum admittar]** ‘I shall when the condition is fulfilled be admitted to the usufruct’, and consequently have to give the usual usufructuary’s stipulation. *Admittere* is frequent in such cases where the interposition of the praetor is usual, e.g. D. xxxv. 1. 1 26. pr. *quamvis uerbis edicti ad hereditatem uel legatum admittatur*; v. 2. 1 6. § 1 *si quis ex his personis quae ad successionem ab intestato non admittuntur*; xxxvii. 6. 1 1. § 8; xxxix. 2. 1 13. § 3.

§ 1. **colono**] 'agricultural tenant'. Cf. D. XIX. 2, especially l 15. The tenant of a house or rooms was called *inquilinus*, cf. ib. l 24. § 2; l 25. § 1; xli. 2. l 37. See above p. 143 *insulam*.

**aget ex conducto**] The usufruct having been bequeathed to him, he claims it as his own (Gai. II. 194). But on his lease the testator was bound to grant him the enjoyment of the land (*ut frui liceat*), and the heir is during the continuance of the lease bound to fulfil the testator's covenants. As the heir cannot fulfil the covenant literally by granting him the enjoyment which is already by the testator's will his own, the heir is bound by the lease to give the equivalent, i.e. release him from the rent and reimburse him for his expenditure. And this is enforceable by an action *ex conducto* (D. XIX. 2. l 15. § 1; l 9. § 6). In our place the legacy was clearly given *per vindicationem*: in D. XIX. 2. l 24. § 5 we have a similar case, but the legacy is *per damnationem*. *Qui in plures annos fundum locauerat testamento suo damnauit heredem ut conductorem liberaret. Si non patiatur heres eum reliquo tempore frui, est ex conducto actio: quod si patiatur nec mercedes remittat, ex testamento tenetur*. There the usufruct did not by the will become the property of the tenant; it still remained with the heir; and the heir therefore was still able to perform the covenants of the lease and let the tenant enjoy. If he did this, the tenant had no right on the lease to demand remission of the rent. For this he must sue on the will, which bound the heir to release him from the rent.

**impensas quas in culturam fecerat recipiat**] What expenses the tenant is in this circumstance authorised to recover is not free from doubt. If the lessor is chargeable with the breach of contract, the tenant ought to receive *id quod interest* (D. XIX. 2. l 15. § 8); if the fulfilment of the contract is impossible owing to something which the lessor could not hinder, remission of the rent is all that can be required (ib. l 33. fin.). But the case which we are dealing with is one in which the lessor is indeed the cause of the non-fulfilment of the contract, but only because he thereby intends to benefit and does benefit the lessee. The reasonable thing is to treat the tenant as he would be treated if the lease had expired in the natural course of events, i.e. to reimburse him for any ordinary expenditure (e.g. seed and manure) which the remission of the rent has not covered, and also for any special expenditure which, either by the terms of his lease (cf. l 24. § 3) or by the obligations of the situation, he may have been induced to make, and which would have been recoverable by a tenant according to the general law. For necessary or useful expenditure, although not covenanted, entitles the tenant to reimbursement according to ib. l 55. § 1; l 61. pr. In fact the tenant, on the legacy taking effect, gives up his holding as a tenant and is entitled to the usual reimbursement: and then starts afresh on the farm, as his own for his life or till forfeiture, in the condition in which the farm then is, whether improved or not by his previous occupation as lessee.

§ 2. **uniuersorum bonorum**] ‘of the whole of his estate’. See above on l 29 *omnium bonorum* p. 187.

**hactenus interesse**] ‘there is this much difference’; usually followed by *quatenus*, here by *quod*, cf. l 9. § 7.

**si aedes incensae, &c.**] See D. VII. 4. l 5. § 2, which is express on the point and refers to Julian. See also above l 36.

**usus fructus specialiter aedium legatus**] ‘the usufruct of a house as such’, not the usufruct of a plot of land with a mass of bricks and mortar.

**eorum quae in specie sunt**] ‘of those things which are in specific form’, i.e. a house, a cup, a garden; not existing as a rude mass, as mere bricks and timbers, or mere land, or a lump of silver, &c. Compare the use of *species* in D. XLI. 1. l 7. § 7. This is the meaning also in the passages where *species* is opposed to *genus*, e.g. in D. XII. 1. l 2. pr. *mutuum damus, recepturi non eandem speciem quam dedimus (alioquin commodatum erit aut depositum) sed idem genus; nam si aliud genus, ueluti ut pro tritico uinum recipiamus, non erit mutuum. Substantia*, ‘substance’, to which it is here opposed, is still more general than *genus* (‘kind of substance’). For *substantia* cf. Gai. II. 79 *quidam materiam et substantiam spectandam esse putant*. Dirksen s. v. takes it here in the sense of a man’s total property. But that is represented here by *uniuersorum bonorum*, and *substantia* means the underlying stuff.

l 35. pr. **hoc quoque praestabitur**] ‘this also will be made good’, i.e. the heir will have to make good to the usufructuary the loss sustained by the delay. Cf. below, l 36. § 2.

§ 1. The testator bequeaths to me the usufruct of a slave, and at the expiration of my usufruct (either by death, *capitis deminutio* or non-user) gives the slave his freedom. Instead however of my actually having the slave’s services, I receive from the heir the money value. Is the slave thereby at once entitled to his liberty? No. My user may be said to continue in the form of enjoyment of the money equivalent (cf. l 12. § 2). And therefore the slave’s freedom is neither accelerated nor defeated, but remains in abeyance until I die or suffer *cap. dem.* &c.

**aestimationem legati**] In some cases, as for instance when the specific thing bequeathed belongs to another and cannot be obtained from him or when a slave has run away, the heir *can* only pay the value instead of handing over the thing or slave. So if the same thing was left *per damnationem* to two persons separately, the heir could only give the thing to one, and pay the value to the other. Moreover as the condemnation in the formula always was expressed in money, it is possible that the heir could, if he chose not to give up the thing or slave, retain it and pay the value, such value however being liable in that case to be fixed at an extravagant amount (Gai. IV. 48 sqq.; cf. D. XLIII. 29. l 3. § 13). D. VI. 1. l 68, which



directs the judge to restore the thing by main force, is generally considered to have had this interpolated by Tribonian. See Savigny *System*. v. p. 123; Bethm.-Hollweg II. 226; 698; Wächter *Pand.* I. p. 563; *contra* Rudorff II. § 92. p. 307.

**nihilo magis]** It seems to have been thought that as the intended fructuary did not, and could not, actually *uti frui*, this was equivalent to his having ceased *uti frui*. To which Julian answers that the assumption is incorrect: the legatee did *uti frui*, but in another form, cf. l 39.

**interuentu]** 'on the occurrence' which as it were *interferes* with the continuance of the previous state of things. In other places *interuentus* has more force than appears here. Cf. D. IV. 6. l 26. § 7; XL. 11. l 2; &c.

l 36. pr. The difference between the two cases mentioned here is this. An *area* is simply an unoccupied piece of ground, and is not altered by a building having been erected on it, if the building is no longer there, when the legacy vests. But the usufruct of a building is not the usufruct of any and every building, but of a specific building, and on the destruction of that specific building the legacy becomes void. An *area* occupied by a building is an *area* no longer, and a building destroyed is of course a building no longer, and therefore the usufruct in both of them is impossible (cf. D. XXX. l 47. § 4; § 6; &c.). In D. VII. 4. l 5. § 2; § 3; l 10. § 1 we have the same rule applied to the continuance of a duly-constituted usufruct, which is here applied to the existence of it at all. The rule is different as regards a legacy of the things themselves, and not merely of the usufruct of them. The bequest of an *area* carries with it any buildings erected on it (D. XXXI. l 39); the bequest of a building however is not valid, if the whole building be new since the will was made, and not merely repaired gradually but completely (D. XXX. l 65. § 2).

**existimavit]** viz. the lawyer consulted on the question, whether Africanus himself or not. Mommsen, *Z. R. G.* IX. p. 90, is inclined to think that Africanus reported the opinions of Julian, and hence usually we have the third person, not the first. But the first and third persons are both found in other writers, perhaps, as Mommsen suggests, from misinterpreting an abbreviation.

**non idem iuris esse]** 'the same rule is not law'. Cf. *quaestio est* l 25. § 3, and note p. 168; *quid iuris sit* (l 37; XX. 5. l 7. § 2); *id iuris est* (XIII. 7. l 5); *idem iuris est* (XLV. 1. l 85. § 4); &c.

**si insulae, &c.]** 'if when the usufruct of a block of buildings had been bequeathed, it had been made into a vacant plot, and then into a block of buildings again'.

**scyphorum]** A *scyphus* was a large bowl or cup, said to have been originally a shepherd's wooden bowl or pail, and afterwards made in pottery or silver (Athenae. XI. pp. 498—500). It is what Hercules is

often represented as holding: *Scyphus Herculis poculum est* (Macrob. v. 21. § 16 commenting on Verg. *Aen.* viii. 278). *Faginus astubat scyphus* (Tibull. i. 10. 8); *scyphum eversum* (Suet. *Claud.* 32), cf. Trebell. *Claud.* 17; Becker's *Gallus*, ed. Göll. iii. p. 407.

**deinde massa facta, &c.**] 'if they had then been reduced to a mere mass of metal; and then again made into bowls'.

**pristina qualitas scyphorum**] 'the former character of bowls'. *Scyphorum* is probably a genitive of definition (*Gr.* §. 1302).

**non tamen illos esse**] 'still (he considered) they were not *the* bowls, the usufruct of which had been bequeathed'.

§ 1. A verbal contract is made for an estate, the promiser reserving the usufruct. What is the import of this reservation? Is it simply for the benefit of the promiser, and consequently on his death does it fall to the propriety? or has the promiser a power of appointment to be exercised in favour of anyone whatever that he chooses? The usual case was to reserve simply for oneself, but if the reservation was in gross, there is nothing to restrict it to the promiser, and the event only can shew decisively; cf. l 54. So with the reservation of an urban servitude: if the seller of a house declares in the sale *seruas fore aedes, uel suis aedibus eas seruas facere potest uel uicino concedere seruitutem* (D. viii. 4. l 6. § 3a). So much for the contract. But when effect comes to be given to the contract by the conveyance, the reservation or declaration of servitude must be express: the house or person, in whose favour the servitude is constituted or reserved, must be stated (*ib.*). In our text the promiser dies before conveyance. If the reservation was simply for himself, the usufruct reverts on his death to the propriety, and the person who had duly contracted for the propriety is entitled to demand from the promiser's heir conveyance of the whole estate without deduction of the usufruct: if it was a reservation in gross, then he can only demand conveyance of the propriety.

**de Titio**] So in l 37; D. xlv. 1. l 22. *Ab* is much more common; cf. l 7. § 2. p. 65.

**detracto usu fructu**] Cf. D. xlv. 1. l 56. § 7; l 126. § 1 and note on l 32 *excipere* p. 195.

**decessit**] 'died'. So frequently, e.g. D. ix. 1. l 1. § 13; xxi. 1. l 31. § 11.

**respondit**] i.e. the lawyer consulted, whoever he was, gave the answer.

**referre qua mente, &c.**] 'that it depends on the intention'. Cf. D. l. 17. l 34 *Semper in stipulationibus et in ceteris contractibus id sequimur quod actum est*, i.e. what was the obligation actually entered into; xlv. 1. l 21. pr. *Facti quaestio inducitur quid senserit, hoc est quid inter eos acti sit: utique enim hoc sequimur quod actum est*. See an interesting case analogous to our text in D. xxxiii. 2. l 26.

**exceptus**] e.g. *detractus*. See note on l 32.

**promissori dumtaxat**] 'for the promiser and him only'. *Dumtaxat*

is used frequently both in ordinary and law language, as well before as after the word on which emphasis is to be laid: e.g. before the word, Gai. I. 152, 153: D. III. 5. l 41 (42); after, Ulp. XI. 13; D. VI. 2. l 7. § 7; VII. 6. l 3; XXXIII. 2. l 6.

**reciperetur** 'be reserved'. Just above *detrahere* and *excipere* are used in this same meaning. *Recipere* is frequently used of reserving servitudes, e.g. Cato *R. R.* 149; Cic. *Or.* I. 39. § 179 (on which see Wilkins' note): D. VIII. 4. l 5; l 6. fin.; l 10; XVIII. 1. l 40. § 4; XIX. 1. l 53. § 2; XXI. 2. l 69. § 5; XXXIX. 6. l 42. pr. Also of reserving a right to vegetables, Cato l. c.; *pomum recipere* (D. L. 16. l 205); of *ruta caesa* Cic. *Or.* II. 55. § 226; *Top.* sub fin.; of corn crops, D. XVIII. 1. l 40. § 3; of a part of a house, Plaut. *Trin.* 157; of money, in making a dowry, Cato *ap. Gell.* XVII. 6. § 1; of a gift *mortis causa*, D. XXXIX. 6. l 35. § 2. *Servus recepticius* (in Cato *ap. Gell.* l. c.) is explained by Gellius to mean a slave belonging to the part of a wife's property reserved from dowry. (*Dos recepticia* is a dowry given by a stranger, who stipulates for its being repaid on the death of the wife, Ulp. VI. § 5; D. XXXIX. 6. l 31. § 2. Probably the name is derived from *recipere*, 'to receive back'. In Gai. I. 140 *mancipio recipit* is 'receives back by mancipation'.)

**plenam proprietatem** 'the propriety with full rights', i.e. without reservation of the usufruct, below, l 46; opposed to *nuda proprietas*, D. VII. 4. l 2. pr. So *plenus usus*, 8. l 12. pr.; *nudus*, ib. l 1; *plenus fundus*, D. XXXIII. 2. l 6; *fundus pleno iure rediit*, D. XXXIII. 1. l 19. pr.

**manifestus** 'more clearly', because anything not specifically bequeathed remains to the heir as his own; and a usufruct reserved in a legacy would then not revert to the propriety till the heir's death.

**heres a quo** 'the heir from whom', i.e. the particular heir charged with the legacy. See note on l 2. § 2 *ab ea re relicta*, p. 65.

**priusquam ex test. ageretur** i.e. before the usufruct was legally demanded by the legatee from the heir. He could not demand it till the heir entered on the inheritance (D. VII. 3. § 4).

**minus dubitandum** The doubt which some felt was of course caused by the result in the circumstances being in each case (verbal contract, legacy immediate, legacy conditional) contrary to the express words creating the right. The person who is entitled to claim the propriety without the usufruct will receive the propriety along with the usufruct. Why there was less (*minus*) room for doubt here is explained just above under *manifestus*.

**heres eius** i.e. the heir of the heir charged with the legacy.

**idemque et si, &c.** 'and the same holds good also, if', &c.

§ 2. Delay on the part of the heir charged with the usufruct of a slave entitles the legatee to get whatever may be the value to him of the due performance on the part of the heir. If during the delay circumstances occur which make it impossible for the heir to establish the usufruct, the heir is not thereby exempted from compensating the legatee.



See 147: cf. D. XXXIII. 2. 16, where the case is put of a legacy of a usufruct for two years only, and the heir delays till the two years have expired. The usufruct bequeathed cannot now be sued for; any usufruct for another two years would be another usufruct and not that bequeathed. But the heir is liable for the value. In our text two cases are taken, first the death of the slave, i.e. the destruction of the object of usufruct; secondly the death of the intended fructuary.

**cum per heredem staret quo minus, &c.]** The subjunctive (*staret*) is here used to denote what I have called (Lat. Gr. § 1720) 'an essential part of the history', not a cause. 'The heir being in default for not giving effect to the bequest'. *Per aliquem stare (fieri, fore) quominus* is the regular phrase for making default in the performance of a duty, cf. 137; D. II. 8. 18. § 4; XIII. 5. 16. §§ 2, 3; 18. pr.; XIX. 1. 121. § 3, &c. See note on 119. pr. p. 145. It is not necessary that the heir or promiser, &c., should by act or neglect hinder his due performance: default does not imply positive fault: non-performance of the obligation puts the person obliged in default, unless he can shew some unexpected objective hindrance. Not having the money is no valid excuse for not paying what one has promised or is otherwise bound to pay. It is an *incommodum personae*, not an *impedimentum naturale* (D. XLV. 1. 137. § 4).

**aliud dici, &c.]** 'he says there is no room for any other opinion than that the heir is bound so far as this, viz. in the amount of interest which the legatee had in the absence of delay'. Cf. D. XXX. 1. 39. § 1 *Ipsius quoque rei interitum post moram debet, sicut in stipulatione, si post moram res interierit, aestimatio eius praestatur*; XLV. 1. 182. § 1; XII. 2. 130. § 1.

**quanti leg. intersit]** Cf. 147. The measure of damage is not simply the market value of the slave's services for the time, but the loss of the legatee from not having him. And this might be considerably more, as there is the possibility of the fructuary obtaining legacies or inheritances through him (122). Cf. D. IX. 2. 121. § 2; 122.

**moram]** *Mora* is used both in the ordinary sense of delay in general, and in the technical sense of delay for which one is answerable, i.e. default. They both occur in D. XXII. 1. 124 *Si quis solutioni quidem moram fecit, iudicium autem accipere paratus fuit, non videtur fecisse moram*. *Mora* is not default unless the due day has arrived (*dies uenit*); nor usually, in the absence of special stipulation, unless the creditor has applied for payment; (on this disputed point see Vangerow *Pand.* III. p. 186; Wächter *Pand.* § 192, II. p. 397). Cf. ib. 132 *mora fieri intellegitur non ex re sed ex persona, id est si interpellatus oportuno loco non soluerit; quod apud iudicem examinabitur...cum sit magis facti quam iuris*. Excuses are sometimes admissible (ib. 121—123; XLV. 1. 191).

**ex eo tempore]** i.e. the time when delay first occurred (cf. just below *ex eo tempore quo mora sit facta*), i.e. the time when the conveyance of the usufruct was due and was not made.

**usus fructus aestimetur]** In valuing the produce, not only what the

heir has actually taken, but what the legatee might have taken, is to be regarded (D. xxx. 1 39. § 1). The produce taken before the due day of a usufruct belonged to the heir, cf. above 1 27. pr.

**in diem mortis]** 'to the day of Titius' death'. As the usufruct, if established, would yet have been extinguished by the death of the fructuary, the intended fructuary's heir cannot claim anything beyond that.

1 37. The last section treated of delay in the case of a bequest: this law treats of delay in the fulfilment of a stipulation. Otherwise the two cases put here are something similar to that quoted above from D. xxxiii. 2. 1 6. A stipulation for a usufruct or for a slave's services for the next ten years is not a stipulation simply for ten years of a usufruct or of a slave's services, so that it can be fulfilled at any time. Both in form and substance a postponed ten years is very different, and probably much less useful to the stipulator than the ten years next after the stipulation was made. If five years elapse, the ten years stipulated for cannot be given. Still, if the promiser is in fault, he must make amends, and the stipulator can still sue on the stipulation for the fulfilment—if not *in specie* then in the money value. Impossibility of fulfilment is no good plea, when the promiser is in fault (cf. D. xlv. 1. 1 82. § 1; 1 91. § 3; 1 114, &c.), and above, note to *aliud dici*, p. 209. The question whether and how far in an action on a stipulation of a thing the *fructus* can also be claimed (D. xxii. 1. 1 38. § 7), is quite different to the question of our passage, where the usufruct itself was stipulated for.

**de te]** belongs to *stipulatus*. See 1 36. § 1.

**Stichi operas]** Either by legacy or stipulation a man might acquire a right to the services of another man's slave. In what respects did this differ from the usufruct of a slave? This question is answered in the Digest respecting the legacy of such services. The right was not lost by non-use, nor by *capitis deminutio*, nor by the death of the legatee, but only by the death of the slave. The legatee was entitled to hire him out, or the slave might hire himself out: in either case the legatee was entitled to the wages (D. xxxiii. 2. 1 2). The right does not vest like a usufruct on the heir's entrance on the inheritance, but on the day (being that or a subsequent day) on which the services are demanded (D. vii. 7. 1 2; xxxiii. 2. 1 2; 1 7). The same answer would apply to *stipulated* services, except so far as the intention of the parties might be otherwise. The *operae* spoken of in the Digest are frequently *operae liberti* (e.g. D. xxxviii. 1; xlv. 1. 1 54. § 1; 1 73. pr.). See note on 1 12. § 3, p. 88.

**quod per te—darentur]** 'which has been allowed by you to go by without the usufruct being conveyed'. The expression is strange: *quominus darentur* ought to depend on a statement of the hindrance, not of the time which has elapsed during the hindrance. Either *quia per te factum est quominus darentur* or *per quod cessabat stipulatio* would have been better expressions. The text seems a bold compression of both meanings.

l 38. The subject of this law occurs before in l 12. § 2. See the notes there. Our text states what is non-use: that stated what is use.

**uideor us. fr. retinere]** 'it is held that I retain the usufruct; because I am using the price, which, as it were, represents the usufruct', not because the purchaser is my deputy for using it. See l 39; l 35. § 1.

l 39. **non minus habere]** 'not less to have the thing'. *Minus* is adverbial.

*Habere* is a very general word. D. XLV. 1. l 38. § 9 *Habere dupliciter accipitur: nam et eum habere dicimus, qui rei dominus est et eum qui dominus quidem non est, sed tenet: denique habere rem apud nos depositam solemus dicere.* It is applicable to usufructs, ib. § 3, where after discussing the covenant for quiet enjoyment (*habere licere*) usually entered into by the seller to the purchaser, Ulpian proceeds *Si quis forte non de proprietate sed de possessione nuda controuersiam fecerit uel de usu fructu uel de usu uel de quo alio iure eius quod distractum est, palam est committi stipulationem* (i.e. it is plain a breach of the covenant is in issue): *habere enim non licet ei, cui aliquid minuitur ex iure quod habuit.*

It is only as respects the question of forfeiture for non-use that the enjoyment of the price is equivalent to enjoyment of the usufruct itself.

l 40. In the case of gift the fructuary retains nothing, so that the only possible use is the vicarious use by the donee.

l 41. Two cases are here named where a usufruct may be established, though it is at first sight not easy to see where the *fructus* is. The first case is that of a statue or bust; the second that of a landed estate which costs more in keeping up than its produce is worth. The use of the word *utilitas* suggests that some may have doubted not only whether a statue was capable of *fructus*, but even of *usus*, cf. l 28.

**statuæ et imaginis]** The singular is used as more general than the plural. These two things are often mentioned together, e.g. Plin. *H. N.* XXXIV. 15 *Transiit deinde ars uulgo ubique ad effigies deorum.....Transit et a diis ad hominum statuas atque imagines multis modis;* D. XXII. 1. l 17. § 8; XLIII. 9. l 2 *Concedi solet ut imagines et statuæ, quæ ornamēto reipublicæ sunt futuræ, in publicum ponantur;* L. 10. l 5. pr.; l 6 *Qui statuas aut imagines imperatoris iam consecratas conflauerint.....Lege Iulia maiestatis tenentur.* The *statua* was a full-length statue. *Imago* was a portrait or likeness, and might be painted or modelled (Cic. *Fam.* v. 12. § 7) or cast in plaster or wax (Plin. *H. N.* XXXV. 153). The 'likenesses' meant here were probably the bronze or silver busts, which were often placed in libraries and elsewhere to adorn houses or public buildings, and are distinguished from the medallions, i.e. shields exhibiting likenesses in relief. Cf. Suet. *Dom.* 23 *Scalas etiam inferri, clipeosque et imagines eius (Domitiani) coram detrahi et ibidem solo affligi (senatus) iubet.* It is however possible that among 'likenesses' may be included the wax masks



(often called *imagines* and probably the earliest form of likeness) which were made to represent a man's ancestors and (fastened probably upon busts, &c.) placed in cabinets (*armaria*) in the side wings of the inner hall (*atrium*). See Plin. xxxv. 4—14; Vitruv. vi. 3. § 6; Sen. Ben. iii. 28; Marquardt, *Priv. Alt.* p. 235 sqq.

**posse relinquere magis est]** 'The better opinion is that such a legacy is good'. *Magis est*, 'it is more the fact', is found in Cic. *Cael.* 6. § 14 *In magnis cateruis (Catilinae) amicorum si fuit etiam Caelius, magis est ut ipse molesta ferat errasse se.....quam ut istius amicitiae crimen reformidet*; Att. xvi. 5. § 2 *Quamobrem etsi magis est quod gratuler tibi quam quod te rogem, tamen etiam rogo*; and frequently in the jurists; e.g. generally with *ut* Paul. *Sent.* iii. 1 *Si fratri puberi controversia fiat, an pro parte impuberis differri causa debeat variatum est: sed magis est ut differri non debeat*; Vat. Fr. 206; D. i. 9. 17. § 2; xxvi. 2. 116 ter; xxvii. 9. 15. § 15, &c.; with *ne*, D. xviii. 4. 12. § 2; xxvii. 9. 15. § 14; xxxix. 1. 11. § 13 *Si quis aedificium vetus fulciat, an opus novum nuntiare ei possumus videamus, et magis est ne possimus*; but also with *infin.* clause (as here) D. xlvi. 3. 172. § 4 *Et magis est deficere stipulationem*; ix. 2. 132. pr.; xxxvii. 4. 11. § 7; xlvi. 2. 13. § 2; 144; and absolutely D. xxi. 1. 115 fin. *sed illud magis est quod diximus*; xiii. 7. 11 *quod magis est*; xx. 6. 18. § 17; xl. 4. 113. pr.

§ 1. **ut magis, &c.]** 'that we rather spend on them than acquire from them'; not 'spend more', which would be *plus imp.*

142. pr. The use contains some part of the produce, e.g. vegetables and flowers for daily use, but not to sell; oxen for ploughing; cattle for manure, but not lambs, or milk, or wool (D. vii. 8. 112). The *fructus* will in this case, if bequeathed separately, not carry with it all the produce, but so much as is left after the legitimate requirements of the user are satisfied. But the fructuary will also have a right of using: for the produce and the usufruct are the same: and thus if the produce be left with an express deduction of the use, the legacy is useless: if the produce be left without specifying the use, the use is included (D. vii. 8. 114. § 1). *Si quis fructum, deinde usum stipulatus fuerit, nihil agit* (xlv. 1. 158), because with the *fructus* he has already got the *usus*. Paul. *Sent.* iii. 6. § 24.

§ 1. **rerum an aestimationis, &c.]** The difference between the two lies herein. If the usufruct of the goods of a man after his death is bequeathed to one who has also a legacy of a specific portion of them, the legatee actually gets the property (inclusive of the usufruct) in that portion, and the usufruct only in the rest. But if to the same man besides the specific legacy is left also the usufruct in the value of the goods of the testator, he gets the specific legacy and the usufruct in the value of the whole. In this latter case there is nothing to prevent the usufruct being held to extend over the whole value: in the former he gets the property in part and cannot have a usufruct in his own pro-

perty, but only in the rest of the testator's goods. If a legacy of part of the testator's goods were made, the heir could choose whether to divide the goods or give a share of the value (D. xxx. l 26. § 2).

**saepius idem legando]** 'by bequeathing the same thing more than once', i.e. to the same person (cf. D. xxx. 34. § 1). If the same thing is left first to one person and then to another (*disiunctim*), the ordinary interpretation would be that each was to have an equal share; but it might be, if the testator clearly so intended, that the first legacy was revoked by the second, or, if the testator clearly so expressed it, that each was to have the whole, i.e. one get the thing and the other its value (ib. l 33). Under the law before Justinian something depended on the form of the legacy, whether *per uindicationem* or *per damnationem* (Gai. II. 199, 205).

**l 43. dimidia pars...continetur]** The reason for this rule is probably that a half is the only part which has on each side of it, i.e. in excess and defect, an equal quantity, and therefore a balance of probabilities. Cf. D. xxx. l 19. § 2 *In legato pluribus relicto, si partes adiectae non sunt, aequae seruantur*; xvii. 2. l 29. pr.; l. 16. l 164. § 1.

**l 44.** The usufructuary may not of his own right put new plaster on rough walls. Plaster was regarded as an ornamental, not a necessary, addition, and consequently money borrowed by a slave and expended without his master's orders on new plastering was not chargeable against his master as having been converted to his master's use (*in rem uersum* D. xv. 3. l 3. § 4). He may however repair such an ornamental plaster, if he finds it, and may colour it or paint and otherwise adorn it (above, l 7. § 3; l 13. § 7), but the character of the house or rooms is not to be changed.

**qui rudes fuissent]** 'which had been left rough'; not plastered smooth and polished for paintings. The pluperfect is frequent after a present in the Digest; so *accepisset* just below.

**tametsi—esset]** 'even though he would have made the position of the owner better by improving the building'. See above, l 13. § 7. For *causa* see note on l 13. § 4, p. 105.

**tueri]** 'maintain'. Cf. D. xxv. 1. l 15 *Tueri res dotales uir suo sumptu debet*. Just before, *tutela* is used of the same. Cf. Cic. *Off.* II. 23. § 83 *Cum ego emerim aedificarim tuear impendam, tu me inuito fruarere meo?*

**ac nouum facere]** Flor. has *an nouum faceret*. The inferior mss. generally have *aliud nouum facere*, which Mommsen recommends. This mode of expression makes good sense, and is found elsewhere in the Digest (e.g. D. xxiii. 3. l 20), but the substitution of *ac* for *an* is simpler, and *ac* is more likely to have been altered by copyists either to *an* or *aliud*, and makes equally good sense. *Alius...ac* is common in ordinary writers. (Does it occur in the Digest?) Bas. has *φυλάττειν γὰρ ὀφείλει ὅπερ εὖρεν, οὐ μὴν καινοποιεῖν*, which is not decisive as to the words of the

Latin. The Florentine reading is impossible: *faceret* is no doubt due to *an*: but *an* is wrong altogether.

l 45. The usufructuary of a slave is bound to defray the cost of his food as well as of anything made requisite by illness.

**cibariorum]** *Cibaria* are often mentioned in legacies, e.g. D. xxxiv. 1. l 21 *Diarii* (daily rations) *uel cibariis relictis neque habitationem neque uestiarium neque calciarium deberi palam est, quoniam de cibo tantum testator sensit*. See above, l 7. § 2 *alimenta*, p. 63. *Cibaria* is also used of food for cattle, D. ix. 2. l 29. § 7; Cato, *R. R.* 60.

**ualetudinis impendia]** Expenses occasioned by the illness of a slave, e.g. medical treatment, if moderate, could not be recovered, any more than the cost of food, by a borrower (D. xiii. 6. l 18. § 2 *Possunt iustae causae interuenire ex quibus cum eo qui commodasset agi deberet, ueluti de impensis in ualetudinem serui factis:.....nam cibariorum impensae naturali scilicet ratione ad eum pertinent qui utendum accepisset. Sed et id, quod de impensis ualetudinis.....diximus, ad maiores impensas pertinere debet: modica enim impendia uerius est ut, sicuti cibariorum, ad eundem pertineant*), nor by the husband in respect of a dowry slave, D. xxv. 1. l 12 *Omnino et in aedificandis aedibus et in reponendis propagandisque uineis et in ualetudine mancipiorum modicas impensas non debet arbiter curare: alioquin negotiorum gestorum potius quam de dote iudicium uidebitur*; ib. l. 2.

**ad eum respicere]** 'to look back to him', i.e. 'regard him'. Cf. D. xviii. 1. l 34. § 6; 4. l 2. § 9 *Sicuti lucrum omne ad emptorem hereditatis respicit, ita damnum quoque debet ad eundem respicere*; xv. 1. l 19. § 1; xxxvii. 5. l 3. § 4; &c. So Caes. *Bell. Civ.* iii. 5 *ad M. Bibulum summa imperii respiciebat*.

**natura manifestum est]** 'is clear without proof'. Cf. D. xliv. 7. l. § 12 *Furiosum siue stipulatur siue promittat nihil agere natura manifestum est*; ib. § 14; xlv. 1. l 75. § 4.

l 46. pr.] A son in the power of his father at the time of the father's making a will must either be named as heir or expressly disinherited. If he be passed over, the will is void *ab initio* (Gai. ii. 123; D. xxviii. 2. l 7) and the son succeeds to the inheritance as if no will were made. An emancipated child or children, if passed over, could by the praetor's edict claim, the father's will notwithstanding, possession of the goods, i.e. of the inheritance, of his deceased father. An adopted son who had not been emancipated, and a natural son who had been adopted by another but had been emancipated by his adoptive father, had this right as much as a natural son who had never been adopted (D. xxxvii. 4. l 1. pr.; l 6. § 4). A son made heir by his father had not this right, unless another son who had been passed over exercised it, in which case the instituted son was allowed to claim it for himself. If instituted heir only to a small share of his father's property, he might gain by thus setting the will entirely aside and coming on equal shares with



his brothers into the possession (D. xxxvii. 4. l 3. § 11; l 8. § 14). What has been said of sons is true also of daughters and of all descendants, who in the order of intestate succession would have been *sui heredes* if not emancipated (D. xxxvii. 4. l 1. § 1). Emancipated children were thus put on the same footing as regards their father's will with children *in sua potestate*. But the praetor in thus recognizing natural claims which the testator had ignored, guarded against thereby doing violence to other natural claims which the testator had recognized. If the will was thus upset, the legacies would fall with it. So the praetor protected legacies in favour of children and their descendants and of parents, and legacies on account of dowry to a wife or daughter-in-law (D. xxxvii. 5. l 1). A person claiming the possession against the will could not take a legacy as well (l 5. § 7). And further, any child so claiming the possession had to share with such children of the same grade as were instituted heirs any property which he himself had (D. xxxvii. 6. l 1. pr.; ib. § 24; Collat. xvi. 7. § 2). A child in the testator's power, if named heir, was liable to any legacies charged on him, and if with those who were passed over he received possession of the property, he would share with them the payment of the protected legacies, but so that the Falcidian fourth was reserved for the heir, and the legacies were abated so that no legatee should get more than a child (D. xxxvii. 5. l 14. § 1; l 6). A child in the testator's power, if passed over, succeeded to the possession as if no will had been made, and the legacies, if there were no other heir on whom the legacies were charged, fell altogether (ib. l 15. pr.). A child disinherited could do nothing except impeach the will of undutifulness (ib. l 8. pr.; see note below on l 57).

In the case mentioned in the text a stranger is instituted heir: an emancipated son is passed over. Whether any other son was instituted heir also is not said; apparently not. The emancipated son claims his rights and obtains the *bonorum possessio*. The stranger is ousted altogether. The deceased had bequeathed to his mother the property in something (it is not told us in what) reserving the usufruct. The bequest would be maintained. The usufruct thus reserved would have belonged to the heir or heirs instituted by the will: as the will is upset, who is to have this usufruct? the son as *de facto* in the position of heir? or the mother as having the ownership (or reversion) of the thing? For the son it might be argued that anything not specifically bequeathed fell to the heir; and the son was now put by the praetor into the heir's shoes. For the mother it might be urged that the usufruct had been reserved only for the benefit of the heir appointed by the testator, and certainly not for the son whom the testator had passed over altogether: consequently it would escheat to the proprietary, i.e. to the mother (see l 36. § 1). However, regard for the duty of a son to his mother decided the point in favour of the mother, who would receive the full ownership. Godefroi refers to another decision made *pietatis intuitu* (D. xxxii. l 41. § 2).

**extraneo]** see note on l 67.

§ 1—l 47. A direction by a testator to his heir, to repair a block of houses of which he has bequeathed the usufruct to another, is enforceable against the heir; and if he neglects, and the fructuary dies, the fructuary's heir, although the usufruct ceased at the death of the fructuary, can sue the heir for the damage caused to the fructuary by the heir's neglect.

l 47. **cessasse]** 'delay in fulfilling his duty'. Cf. D. xxxix. 2. l 32 *Si unas aedes communes tecum habui eaeque uitium faciant et circa refectonem earum cessare uidearis*, &c.; iv. 4. l 38. pr. and often. See on l 13. § 2. (p. 103).

l 48. **quasi negotium gerens]** 'Assuming to be acting for the fructuary'. *quasi* does not imply that this was a pretence but only that the heir's position was such that his own interest may have partly induced him to take action. Comp. however note on l 13. § 8 *quasi domum* (p. 113). For *negotium gerens* see on l 12. § 2 (p. 85).

**non est cogendus reficere]** On *reficere* see l 7. § 2, p. 58. On the option given to the fructuary to surrender see l 64.

**sed actione neg. gest. liberatur]** 'but on the contrary is freed from liability to an action on the part of the heir for the cost of business done by the heir in making repairs.

§ 1. **siluam caeduiam]** See on l 9. § 7 (p. 77).

**in fructu esse constat]** 'It is well-established law that a plantation, though lopped too soon, is still reckoned as belonging to the usufructuary'. Heimbach (Weiske's *Rechts-Lex.* xi. p. 895) well points out that, if the property in the produce in such a case did not vest in the fructuary, difficulties would arise in the disposal of it, and the usufructuary's proper exercise of his right would be in question on every petty sale. On the general question see note on l 12. § 5 *maturos* p. 91.

**olea immatura]** The unripe olives give better oil: the ripe olives yield more oil (Schneider). Cato *R. R.* 65 says *Quam acerbissima olea oleum facies, tam oleum optimum erit: domino de matura olea oleum fieri maxime expediet*; ib. 58 *oleas tempestiuas, unde minimum olei fieri poterit cas condito*. But Columella distinguishes between *acerbum* or *acstium* *oleum* which is made before December; *uiride* made about December; *maturum* made afterwards. The *uiride* pays best; *quoniam et satis fluit et pretio paene duplicat domini redditum* (xii. 52. §§ 1, 2, 20). Cf. D. xxxiii. 2. l 42 *Cum olea immatura plus habeat redditus quam si matura legatur, non potest uideri si immatura lecta est in fructu non esse*.

l 49. In the case put each of the usufructuaries has an action against each of the two heirs. The double concurrence results in each heir being liable to each usufructuary for a quarter of the whole.

**a Sempronio]** 'from Sempronius', see on l 7. § 2. fin. p. 15; l 13. § 1.

**in parte]** Cod. F. has twice *partem* followed by (once) *parte*. The latter is right. I have corrected the two former accordingly.

l 50. Paulus here gives an answer of Scaevola to a case put to him.

The case and answer are given from Scaevola's *Digesta* in D. XXXIII. 2. 132. § 5. Paulus quotes it almost literally, the only changes being *Titius Maevius* for *Lucius Titius testamento suo Publico Maevio, quacsitum est for quaero*, and *respondit Scaeuola* for *respondit*. See Part I. s. v. Scaevola.

**eius fidei commissit]** 'committed to his honour', i.e. created a trust in favour of Titia for the usufruct of one-half of the estate : or, as we should say, left it to Maevius, as regards one-half in trust for Titia for her life with remainder to Maevius. The words were originally used in the ordinary sense (e.g. Ter. *Eun.* 886 *Ego me tuae commendo et committo fidei*; Cic. *Verr.* II. 1. § 1 *de his rebus quae meae fidei commissae sunt*, &c.), but afterwards became technical. Some cases mentioned by Cicero shew the way in which trusts grew up. A. Trebonius had a brother proscribed by Sulla, and a *lex Cornelia* forbade aid to be given to the proscribed. Trebonius in writing directed his heirs to take an oath to give to his brother each one-half of his share. A freedman took the oath : the other heirs declined. Verres excluded the freedmen and gave possession to the others. Cicero concedes the legality of Verres' action, but comments on its inequitable character (*Verr.* I. 47. § 123). Q. Fadius Gallus made P. Sextilius Rufus his heir, and in his will stated that he had requested the heir to arrange for the whole inheritance coming to the testator's daughter. This was contrary to the *lex Voconia*, which forbade a man registered as having 100,000 asses (Gai. II. 274) making a woman his heir or bequeathing to anyone more than half the estate. Rufus consulted his friends what he should do : no one recommended him to give more than was allowed by the *lex Voconia*, but Cicero implies that he ought morally to have given the whole. Apparently he gave the daughter only half (*Fin.* II. 17. § 55). C. Plotius made Sex. Peducaeus his heir, and secretly requested him to hand over the inheritance to his daughter ; which he did (ib. 18. § 58). Q. Pompeius Rufus (Sulla's grandson) had been condemned in a criminal trial for violence (*de vi*) and was in exile (Dion Cass. XL. 55 ; Cael. ap. Cic. *Fam.* VIII. 1. § 4). The prosecutor was M. Caelius Rufus. Some land was left to his mother Cornelia with a trust (*fidei commissa praedia*) for him, which she did not carry out. Pompeius asked Caelius to take up his cause. He did so, and was successful in a legal trial (*iudicio*), of what nature is not stated (Val. Max. IV. 2. § 7). Gaius (II. 268—288) enumerates many matters in which it was possible to effect by a trust what was inconvenient or impossible to do directly. Augustus first gave legal sanction to trusts by directing the consuls to enforce them : eventually a special judge was created for them, called *Praetor fidei commissarius* (Inst. II. 23. § 1). At first when the law recognized trusts, the heir who was charged with a trust to give up the inheritance remained legally heir, but by certain contrivances the benefit and burden were transferred to the *cestui que* trust. This was gradually simplified (Gai. II. 246 sqq. ; Inst. II. 23). The usual words



used in creating a trust were one or more of the following, *peto, rogo, uolo, fidei committo* (Gai. II. 249). Numerous instances are found in the Digest, e.g. xxxi. 1 77. Justinian put legacies and trusts on the same legal footing and with the largest powers which either of them previously had. The form of words ceased to be of importance (Cod. VI. 43. 1 2; Inst. II. 20. § 3). Hence the words of Ulpian must have been altered by Tribonian to the form now given them in D. xxx. 1. 1 1.

**uillam—aedificauit]** ‘rebuilt a farm-house which was ruined by age but necessary for collecting and storing the produce’. Columella (I. 6) speaks of farm-houses having three parts, *urbana (uilla)*, for the proprietor; *rustica*, for the farmer and his slaves; *fructuaria*, for the produce. For *corruptam* see note on 1 13. § 2, p. 104. *Cogere* is used of the olive-harvest, Cat. R. R. 31; 64; of grapes, Col. XI. 2. § 70; D. VII. 4. 1 13; and generally Varr. R. R. I. 6. § 3; Col. XII. 3. § 9; D. XXXIII. 7. 1 8. pr.; VI. 1. 1 78.

**agnoscere]** See 1 7. § 2. note (p. 62).

**si priusquam u. f. praestaretur, &c.]** One does not understand what so pressing necessity there can have been for the heir’s action. Why should not the usufruct have been established at once? Possibly because, as half only was left to the *cestui que* trust, some negotiations may have been necessary to arrange for a division; and the legatee may have been absent from the country. However that be, all that is decided is, that, if the heir was obliged to build before carrying the legacy into effect, the fructuary must pay his share. Whether the fact was so or not is another question, and quite unimportant to the statement of the principle of the law.

**non alias cogendum quam haberetur]** ‘that the heir cannot be compelled to give effect to the trust except on the terms that account be taken of this expense’; i.e. the *cestui que* trust must pay his share.

The expression *non alias...quam* with the subjunctive may be defended as analogous to *non prius quam*. Another instance occurs in D. XL. 7. 1 40. § 7 *Respondit legata quidem et libertates non alias competere quam rationes redditae essent*. Similarly, not only in language but in meaning, D. XX. 1. 1 29. § 2 *Respondit non aliter cogendos creditores creditoribus aedificium restituere, quam sumptus in exstrukione erogatos...reciperent* (where Mommsen in his edit. proposed to read *quam ut*, and Huschke, *Pandektenkritik*, p. 12 *quam si*). Frontin. *Strat.* I. 10 *neque aliter principes eorum redire posse quam ipse remissus foret* is practically the same thing. *Quam ut* or *quam si* is the usual phrase in such cases. Mommsen suggests inserting *ut* in our passage. *Non aliter...quam ut* occurs in D. XXX. 1 70. § 1; *non aliter...quam si* in Gai. II. 168; 195; IV. 119; D. I. 7. 1 18; XXX. 1 84. § 5; *non alias...quam si* D. XII. 2. 1 13. § 5; XXIX. 5. 1 5. § 2; *non alias...nisi* above, 1 40.

**restituere]** see on 1 5 (p. 47).

**sumptus ratio haberetur]** Cf. D. X. 2. 1 39. pr.; XXIV. 3. 1 7. pr., &c.

l 51. The usufruct being in fact the life interest, it was a mere mockery to bequeath it to a man for the moment of his death. Cf. D. xxxiii. 2. l 5 *Usufructum 'cum moriar' inutiliter stipulor: idem est in legato, quia et constitutus usufructus morte intercidere solet*; xxxv. 1. l 79. § 3. So of a dowry promised for the time of the woman dying, D. xxiii. 3. l 20.

**inutiliter]** 'without effect' i.e. the legacy is invalid. Cf. Gai. ii. 123; &c.

**in id tempus uidelicet collatus]** 'fixed as it is for a time at which' &c., or 'of course because fixed'. *Udelicet* introduces an obvious fact, usually in explanation of a preceding statement. Cf. D. iii. 1. l 1. § 5 *Caecum utrisque luminibus orbatum praetor repellit (a postulando): uidelicet quod insignia magistratus uidere et reuereri non possit*; xxvii. 1. l 30. § 1: but also not in explanation XIX. 2. l *Quid si locauit...quasi fundi dominus, uidelicet tenebitur; decepit enim conductorem.*

**collatus]** Gai. iii. 100 *Si quis ita dari stipuletur 'cum morieris dari spondes', id est, ut in nouissimum uitae tempus stipulatoris aut promissoris obligatio conferatur*; D. xxviii. 3. l 16 *in futurum collatae conditiones*; Cic. Att. vi. 1. § 24 *Haec omnia in mensem mortuum sunt collata*; Plin. Pan. 61 *Si unius tertium consulatum eiusdem in annum contulisses.*

l 52. **si tributa eius rei praestentur]** 'If taxes on the property (which is the subject of the usufruct) be paid', i.e. if it is subject to taxes. So *si quid pendatur*, l 127. § 3.

The burden of taxes falls on the fructuary, as was said before (l 7. § 2; l 27. § 3), unless there be a special trust directing the heir to pay the taxes. Arrears of rates and taxes were presumably payable by the heir without such special direction. (See note on l 7. § 2, p. 62.)

l 53. The usufruct of a block carries with it the usufruct of the supporting ground; but if the block of buildings be removed, the usufruct is gone, and there is no claim to a usufruct in the vacant ground. So much was laid down in l 36. pr. *contra autem*, &c.; vii. 4. l 5. § 2. But the removal of part of the building does not extinguish or affect the right to the usufruct of the ground either in whole or in part. The ground is accessory to the block of buildings and accessory as a whole; and, as long as any of the building remains, I retain my right to the usufruct in the building and accessories. Cf. D. vii. 4. l 8; l 9 *Fundi usufructu legato si uilla diruta sit, usufructus non exstinguetur, quia uilla fundi accessio est: non magis quam si arbores deciderint. Sed et eo quoque solo, in quo fuit uilla, uti frui potero.*

l 54. The usufruct of an estate is bequeathed from the heir to Titius conditionally on some event. The heir sells and delivers the estate, before the condition takes effect, but reserves the usufruct. To whom does the usufruct belong under the different possibilities? Until the condition takes effect, the heir has the usufruct. If the condition takes effect, the usufruct passes from him to the legatee. On the death

or forfeiture of the legatee, it reverts to the ownership, which has passed from the heir to a purchaser. If the condition does not take effect, the legacy drops, and the question now arises does the usufruct continue with the heir in virtue of his reservation on the sale of the estate? *Prima facie* it does, but all depends on the real intentions of the parties to the sale (compare l 36. § 1). If the heir reserved the usufruct merely in order to satisfy the contingent bequest, and this was understood as part of the bargain, then the usufruct reverts to the purchaser as bare owner of the estate. If this was not the bargain but the heir reserved the usufruct for himself, subject to the contingency, then on the contingency failing the heir enjoys his usufruct.

**intellego te de usu fructu, &c.]** i.e. I understand you to be asking not who has the usufruct reserved on the sale: (that of course belongs for the time to the heir) but who has the usufruct which was as it were contingently separated from the ownership by the testator in his bequest? There are not really two usufructs of the same estate: but two creations of a usufruct, one certain, but apparently temporary, by the reservation on the sale: the other contingent on the occurrence of some event.

**ad proprietatem fundi reuertatur]** The usufruct on being lost reverts to the propriety as its natural home (l 3. § 2; l 36. § 1). But, it may be said, the heir in selling the estate had expressly reserved the usufruct: consequently the usufruct, on being set free from the legatee, will come to the heir. To which the answer is that only the owner can create a usufruct. The heir while owner did create by reservation a usufruct, but that usufruct could only last until the condition took effect, because the testator had already created a usufruct to run from the happening of that event. The usufruct created by the heir then came to an end: the usufruct created by the testator commenced; and on its expiring the ownership becomes full again and only the owner can create another usufruct. A usufruct is not a continuously existing right distinct from but parallel to the ownership, so that it can be carved out into successive periods and disposed of to successive beneficiaries. It is a right attached for a time to a particular person and dies absolutely on being dis severed from that person. Compare note on l 34. pr. *legatum non habebit* (p. 202) and D. vii. 6. l 4.

**ita ut in eius persona]** 'subject however to the application to his person of the same rules of law which are regularly observed in reference to the loss of a usufruct'. We must assume the condition attached to the legacy to be one of such a kind that not merely its non-occurrence but the impossibility of its occurrence is ascertained (e.g. if Titius within five years from the testator's death shall be consul: the five years elapse without his becoming so). Then the contingent usufruct which would have been attached to Titius' person fails altogether, and the usufruct reserved at the sale alone remains in question. This is attached to the



heir's person and will remain with him, only so long as he lives, and has not his 'head broken', and continues to use it. Javolenus (by the words *in eius persona*) apparently wishes to guard against the idea that there is only one usufruct in question, viz. that attached contingently to the *persona* of Titius, and that this usufruct will live and die with Titius, though actually enjoyed by the heir. The usufruct was not an estate for the life of Titius and consequently now held by the heir *pur autre vie*. The person of the testator's heir, not that of Titius, is now concerned.

**spectandum id erit, quod, &c.]** All depends on the understanding of the parties. Cf. D. XVIII. 1. 141; 6. 17. § 1; VIII. 5. 120. § 1.

**restitui a uenditore]** The usufruct was with the heir, who was vendor. The estate itself had been conveyed: the vendor had now to put the purchaser in possession of the usufruct, cf. note on l 3. pr. *induxerit*, p. 35. For *restituere* see note on p. 47.

**l 55. infantis]** See note on l 12. § 3, p. 87. The infant here is of course a slave. The age of seven which was applied to define infancy in some cases would suit this passage fairly well. He could hardly be of use before that age.

**usus tantummodo]** Why is the 'use' only mentioned, and indeed emphasized, as if in opposition to *ususfructus*? And why is the extract placed here instead of in title 8? I cannot answer these questions.

The 'use' of a slave included the personal services of the slave for the usuary and his family, and a slave was a legal channel for the acquisition by the usuary of property by stipulation or delivery, provided that the usuary's property was employed for the purpose. But the usuary had no right to hire out the slave's services, and could not therefore acquire anything in remuneration for them. In short the usuary could through the slave acquire *ex re sua*, but not *ex operis servi* (D. VII. 8. 1 12. § 5—1 14; 1 16. § 2). To act as stipulant or receiver was a service which could not be performed by an infant: but time only was required to bring about the possibility of such a use. And the expectation it appears was sufficient to support a legacy of use; and *a fortiori* to support a legacy of usufruct. A slight foundation was enough, as we may see from l 41 and l 53.

For the subject matter of this extract compare l 12. § 3; and Paul. *Sent.* III. 6. § 18 *Furiosi et aegrotantis et infantis ususfructus utiliter relinquitur: horum trium alius resipiscere, alius conualescere, alius crescere potest.*

**l 56.** The subject of this law is treated also in an extract from Gaius forming D. XXXIII. 2. 1 8, but there confined to bequest. *Si ususfructus municipibus legatus erit, quaeritur quousque in eo usufructu tuendi sint: nam si quis eos perpetuo tuctur, nulla utilitas erit nudae proprietatis semper abscedente usufructu. Unde centum annos observandos esse constat, qui finis uitae longissimus esset.* A community in order to act must act as a whole, and that required a representative, who was usually a slave

of their own, through whom they made and accepted stipulations, gave and received by mancipation, entered on inheritances, brought and defended suits. For conducting actions a citizen or other freeman was formally appointed, and if he was used for making stipulations &c., a *utilis actio* was granted on such stipulations to the administrator (D. III. 4. 11. § 1; 1 6. §§ 2, 3; 1 10; XII. 1. 1 27; XIII. 5. 1 5. §§ 7, 9; xv. 4. 14; XLV. 3. 1 3). Only by legacy in the form *do lego* could a town acquire a usufruct duly constituted in the earlier times: mancipation was not available at all, and a slave could not be a party to a surrender in court. So that the usufruct, if given by a living person, would be only informally constituted by bargain and stipulation. Hence it would require the protection of the praetor (Savigny *Syst.* II. p. 289). And the praetor would be also called into action if, the usufruct being left *per damnationem*, the heir did not put the town into the *de facto* possession of the usufruct, or if anyone disturbed the town in the enjoyment.

For the power of a town to own land see D. I. 8. 1 6. § 1, &c.; to possess through slaves and others, D. XLI. 2. 1 1. § 22; 1 2; to own servitudes, D. VIII. 1. 1 12; to make loans, D. XXII. 1. 1 11. § 1; to receive loans, D. XII. 1. 1 27; to make stipulations, D. XLV. 3. 1 16; to receive legacies, first allowed by Nerva, Ulp. XXIV. § 28; to have *bonorum possessio*, D. XXXVII. 1. 1 3. § 4; to be heirs—but in Ulpian's time only to their freedmen's property, Ulp. XXII. 5; a right extended by the Emperor Leo to all, Cod. VI. 24. 1 12. The right of emancipating their slaves was granted by a senate's decree A.D. 129, in extension of a previous right, Cod. VII. 9. 1 3; D. XL. 3. 1 1; and the full rights of a patron conceded to them (D. XXXVIII. 3). All towns under Roman rule were allowed by the Sc. Apronianum (A.D. 117? 123?) to receive an inheritance by way of trust, and were required to appoint an *actor* to bring and defend consequent actions, D. XXXVI. 1. 1 27; 1 28. pr. See Savigny *Syst.* II. §§ 89—93.

**usus fructus nomine]** 'by the title of usufruct,' i.e. 'to enforce or recover their right of usufruct'. Cf. D. VII. 5. 1 8 *usufructus itaque nomine partem pecuniae petendam ab eo qui satis accepit a coherede, incertique cum eo agendum, si satis non dedisset*; and again *neque fructus nomine interim teneri*; 9. 1 7. pr. *si usufructus nomine re tradita satisdatum non fuerit*; XLIII. 16. 1 3. § 17 *Qui usufructus nomine qualiterqualiter fuit quasi in possessione, utitur hoc interdicto (de ui)*. Similarly *hereditatis legatorumque nomine capere* (Gai. I. 24): *fideicommissi nomine semper in simplum persecutio est* (II. 282); *damni nomine actionem introduci manifestum est* (III. 216); *tributorum nomine praestari* (XIX. 1. 1 13. § 6); &c.

**municipibus]** 'the burghers', i.e. in their collective capacity. Cf. D. XXXIV. 5. 1 2 *Ciuiibus ciuitatis legatum uel fideicommissum datum ciuitati relictum uidetur*; III. 4. 1 2 *Si municipes uel aliqua universitas ad agendum det actorem, non erit dicendum quasi a pluribus datum sic*

*haberi: hic enim pro republica uel uniuersitate interuenit, non pro singulis; ib. 1 7 Sicut municipium nomine actionem praetor dedit, ita et aduersus eos edicendum putauit... Si quid uniuersitati debetur singulis non debetur, nec quod debet uniuersitas singuli debent; I. 8. 1 6. § 1; XLVIII. 18. 1 1. § 7.* Savigny says *municipes* is the term most generally used for a community and was applied to a colony as well as a *municipium* properly so called (*Syst. II. p. 249*).

**actio dari debeat**] The doubt was not due so much to the difficulty of getting over any absence of due formality in constituting the usufruct, as to the apparent incongruity of a strictly personal right, which was always terminated by the death or loss of civil position of the holder, being recognised in a body which did not die and was not likely to lose its position in the state.

**neque morte nec facile cap. dem.**] The corporate character was taken away from Capua as a punishment for its adherence to Hannibal, Liv. XXVI. 16 *Urbs seruata est ut esset aliqua aratorum sedes, ... ceterum habitari tantum tamquam urbem frequentarique placuit; corpus nullum ciuitatis nec senatum nec plebis concilium nec magistratus esse; praefectum ad iura reddenda ab Roma quotannis missuros.* Such a condition may be considered analogous in a community to *capitis deminutio* in the case of a man. Carthage on the other hand was utterly destroyed. App. Lib. p. 135 Καρχηδόνος εἴ τι περιλοιπον ἔτι ἦν, ἔκριναν οἱ Ῥωμαῖοι κατασκάψαι Σκιπίωνα καὶ οἰκεῖν αὐτὴν ἀπέειπον πᾶσι, and this was by Modestinus compared to the death of a man, D. VII. 4. 1 21 *Si ususfructus ciuitati legetur et aratrum in ea inducatur, ciuitas esse desinit, ut passa est Carthago, ideoque quasi morte desinit habere usum fructum.* Cf. Hor. Od. I. 16. 20. When Gaius says a burgher-community will not die, he merely means to contrast the continuous ideal life of a corporation with the limited physical life of a man. Possibly he would have regarded Carthage as having undergone, not death, but *cap. dem. maxima*.

**proprietas inutilis, &c.**] See I 3. § 2.

**tuendi in eo us. fr. municipes**] i.e. by the praetor allowing them according to circumstances to bring an action or make a plea, as if they were a real person. Thus though statues in public places were not the property of the citizens, the community was allowed to bring and defend suits against private persons attempting to remove them, and even against those who placed them there; *Tuendi ciues erunt et aduersus petentem exceptione et actione aduersus possidentem iuuandi* (D. XLI. 1. 1 41). So *tueri* is used of the praetor's action in respect of some water rights not strictly servitudes *licet seruitus iure non ualuit, si tamen hac lege comparauit seu alio quocunque legitimo modo sibi hoc ius acquisiuit, tuendum esse cum qui hoc ius possedit* (VIII. 4. 1 2); of slaves informally emancipated (i.e. not *uindicta* nor *censu* nor *testamento* Dosith. 5) *per legem Iuniam eos omnes quos praetor in libertate tuebatur liberos esse coepisse* (Gai. III. 56); of a pledgee where the pledgor had not full legal



ownership (D. xx. 1. 1 18); of the pledgee of a usufruct (ib. 1. 1 11. § 2); of a pledgee before the debt was actually due (ib. 4. 1 9. pr.); of the holder of a building on another man's ground, *tuetur praetor eum qui superficiem petit* (XLIII. 18. 1 1. § 2); of anyone sent into possession, *conuenit praetori omnes quos ipse in possessionem misit tueri* (XLIII. 4. 1 1. § 2); but emancipated sons or patrons, who having neglected to apply for possession *contra tabulas* claim as if on an intestacy, *non solet tueri praetor aduersus scriptos heredes* (XXXVIII. 6. 1 2); and in other cases, *si res talis sit ut eam lex aut constitutio alienari prohibeat, eo casu Publiciana non competit, quia his casibus neminem praetor tuetur ne contra leges faciat* (VI. 2. 1 12. § 4). See also note on l 25 fin. *per traditionem* (p. 174) and D. VII. 4. 1 1. pr. there quoted.

1 57. The usufructuary of an estate has the estate bequeathed to him, and after enjoying it for some time has to restore it to the son of the testator, who has succeeded in upsetting the will. For the time the usufruct has been apparently merged in the ownership: but it revives as a separate right on the ownership being under these circumstances withdrawn again. A similar case is given in D. XXXVIII. 2. 1 35, where the ownership was withdrawn by *bonorum possessio* being granted *contra tabulas*. For cases of effectual merger see above l 34. § 2; 1 36. § 1.

**inofficiosi test.]** The *querela inofficiosi testamenti* was a proceeding to have a will annulled on the ground of its being wanting in due respect to the claims of near relations. The testator is supposed so far not to have been in his right mind (*non sanae mentis*, D. v. 2. 1 5), if he passed over or disinherited one who had a claim and was not undeserving. Such a claim, if proved, was good on behalf of children impeaching their parents' will, or of parents impeaching their children's; or as between brothers and sisters; but only if and so far as the claimant would be the heir or an heir, if the testator had died intestate (ib. 1 1; 1 6. § 1; 1 15. § 2). The claim was defeated, if the claimant received under the will or in contemplation of the testator's death a fourth of the inheritance after debts and funeral expenses and the value of slaves manumitted were deducted. If there were more persons in the same order of succession, each could only claim his share of the fourth (1 8. §§ 6—9; 1 25). Any action of the claimant under the will, or in recognition of it as valid, forfeited his claim (1 23. § 1; 1 12. § 2). This suit was in addition to other remedies, especially to the right of claiming the *bonorum possessio contra tabulas* (above, p. 214 sq.). But an emancipated son passed over in his father's will could not impeach the will, if his own son still in the grandfather's power was made heir (1 23. pr.). On the other hand the *bonorum possessio* was not open to a disinherited child (D. XXXVII. 4. 1 8. pr.). A will pronounced undutiful was null for all purposes, legacies and freedoms included (D. v. 2. 1 8. § 16).

**recte pertulerat]** 'duly carried', i.e. succeeded in his suit. So also D. v. 2. 1 16. § 1; cf. XXXVIII. 2. 1 14. § 8. The more usual phrase is *obtinuit*. For *recte* see *supr.* 1 9. pr., p. 68.

**ex post facto]** depends on *apparuit*. From what happened afterwards, it was clear that the right of usufruct remained unmerged, i.e. the subsequent event, viz. the success of the son in upsetting his father's will, shewed that the ownership had never devolved on the usufructuary (for the will was invalid), and consequently there had been no merger of the original right into a right which never really existed. For *ex post facto* cf. D. xxxiv. 5. l 15 (16) *Quaedam sunt, in quibus res dubia est sed ex post facto retro ducitur et apparet quid actum est*; XL. 4. l 7; XLIII. 24. l 7. § 4; &c.

§ 1. **ob alimenta]** see on l 7. § 2, p. 63.

**partium emolumentum, &c.]** i.e. as the freedmen died, their shares in the usufruct reverted to the owner (lit. the profit of shares comes from the person of those dying, &c.).

l 58. The principle of this law is that, as soon as the fruits are gathered by the farmer, the right of the fructuary to the rent is vested, although the rent is not payable till the 1st March. The farmer is the agent of the fructuary for the purpose of exercising the right to take the fruit (l 12. § 2; l 38), but the fruits when gathered are not the property of the fructuary but of the farmer by the terms of the contract, which gives him the right of enjoyment (D. xix. 2. l 15. pr.; § 8), see note on l 26, p. 176.

**kal. Mart.]** The 1st of March was the beginning of the year. *Hoc mense mercedes exsoluebant magistris quas completus annus deberi fecit, comitia auspicabantur, vectigalia locabant, &c.* (Macrob. Sat. I. 12. § 7).

**inferri]** *Inferre* 'bring in', i.e. pay, so D. xxxiii. 1. l 21. § 5; xxxi. l 34. § 5 *pretio illato*; xxxix. 4. l 7. § 1 *vectigal intulisset, &c.*; Cod. Theod. vi. 22. l 2 *illatio* 'payment of taxes', &c.

**rem publicam quidem—habere]** The bargain was made between fructuary and farmer, the state was not privy to it. Hence the state can have no claim to the fruits gathered while the usufruct lasted nor to any commutations of them. On the other hand the state would have the right to turn out the farmers at once, and if they allowed them to stop would make such contract with them as might be agreed on for future occupation and rent. That would not affect the right of the fructuary's heir to recover from the farmers the rent for the past year when due.

**sua die]** 'on the day', *sua* relates to *pensionem*. *Suus* is frequently used in the law writers in the sense of 'properly belonging', D. xlv. 1. l 48 *Qui sic stipulatur 'quod te mihi illis kalendis dare oportet, id dari spondes?' uidetur non hodie stipulari, sed sua die, hoc est, kalendis*; xxiii. 3. l 43. pr. *Scaeuola ait matrimonii causa acceptilationem interpositam non secutis nuptiis nullam esse atque ideo suo loco manere obligationem*, 'it remains as it was'; XLII. 8. l 17. § 2 *Hac actione mulier tantum praestabit, quanti creditorum intererat dotem suo tempore reddi*. So the phrases with *quisque* attracted into the case of *suus*, e.g. D. XIII. 7. l 8. § 3 *Si annua bima*

*trima die triginta stipulatus, acceperim pignus pactusque sim ut nisi sua quaque die pecunia soluta esset, uendere eam mihi liceret, &c.* (cf. Lat. Gr. § 2288). In the later legal Latin *suus* is used objectively without any word to which it grammatically refers, e.g. Cod. vi. 50. l 11 *Auxilium legis Falcidiae, quod imploras, apud suum iudicem non prohiberis flagitare*; and in certain phrases, e.g. *sui iuris*, D. XLVI. 2. l 20 *Nouare possumus aut ipsi si sui iuris sumus*; *suus heres*, Gai. III. 29 *Feminae adgnatae tertio gradu uocantur, id est si neque suus heres neque adgnatus ullus erit*.

§ 1. **ex redactu fructuum**] ‘from the produce of the crops’. Cf. D. XLVI. 3. l 88 *Res uendendas per argentarios dedit; argentarii uniuersum redactum uenditionis soluerunt*. The verb *redigere* ‘to get in money’, &c., is common both in law writers and generally, e.g. D. x. 2. l 51 *Fructus post litem contestatam percepti ad eum redigendi sunt habita ratione impensarum*; Liv. II. 42. § 2 *Quicquid captum ex hostibus est uendidit Fabius consul ac redegit in publicum*.

**holeris**] ‘cabbages’, Pliny *N. H.* XIX. 136 *Olus caulesque quibus nunc principatus hortorum apud Graecos in honore fuisse non reperio, sed Cato brassicae miras canit laudes*; Cato *R. R.* 156 *Brassica est quae omnibus holeribus antistat*. Columella II. 10. § 22 speaks of *rapum* as *olus*, and the genus *Brassica* now comprises cabbage, cauliflower, broccoli, rape, turnip, colza, &c. For the spelling, in D. VII. 8. l 12. § 1 we have both *holeribus* and *oleribus*; *holus* is the mss. reading in Horace almost always; see Keller’s *Epil. ad Sat.* I. 1. 74.

**porrinae**] ‘leek’ or ‘leek bed’. Cato uses the same form, *R. R.* 47 *quotannis porrinam serito*; and Arnob. II. 85 *Quid sit triticum dicito, far, hordeum, cicer, lenticula, porrina, caepe*. So *rapina*<sup>1</sup> in Cat. *R. R.* 5. § 8; 35. § 2; Col. XI. 2. § 71 *napinae itemque rapinae siccaneis locis per hos dies fiunt: caepina* in Col. XI. 3. § 56. The longer adjectival forms were used apparently for the herb-beds or crops (*seges* or *segetes* being understood); the simple forms *porrum*, *napus*, *caepa*, &c. denoting either the crop or a single head. The quantity of the penult (*porrina* or *porrina*) appears not to be positively ascertainable. It is generally taken to be long.

**quae habeo**] ‘which properties I have’.

**Farrariorum**] Mommsen suggests *Farraticanorum*, as there is a *pagus* of that name in the territory of Cremona (Henzen *Inscr.* n. 6132 = *Corp. I. L.* v. 4148). There is also one in the district of Placentia, *Corp. I. L.* v. 7356; also named in *Tab. alim. Velleiat.* 3. 48. ‘The district where Ferrara now stands was in ancient times marsh or sea (cf. Mommsen *Corp. I. L.* v. p. 225).

**respondi non usum fructum**] The bequest was held not to be

<sup>1</sup> Godefroi on our passage compares *rapina* in D. xxxi. 88. § 16 and there actually translates *ei rapinam facere* by *rapas ferre et locum iis serendis parare*, ‘slew our son while making a rape bed’! (instead of ‘while robbing him’). For *rapinam facere* cf. Cic. *Att.* xiv. 14. § 5; D. ix. 1. l 1. § 1).



one sixth share of the usufruct of the herb and leek garden, nor (which comes to much the same thing, see note on p. 44 *pro parte indivisa*) the usufruct of one sixth part of the garden, nor a usufruct under the senate's decree (cf. D. VII. 5. 17) which would have involved replacement ultimately by the legatee, but simply one sixth share of the produce of these beds or gardens. A usufruct would have involved both giving security for restitution and also forfeiture by *capitis deminutio* and non-use. Nor would his claim be vested until he had in some way gathered or got possession of the produce. Scaevola's decision put the legatee so far in a better position (cf. D. XXXIII. 1. 18). But the control of the garden would not be so much under the fructuary, as if he had had a proper usufruct.

§ 2. **quotannis uideri relictum**] The bequest was couched in general terms, and, as it related to garden produce, which naturally recurs, was held not to be a mere gift of a sixth of the last or of the next year's crop, but of an annuity, unless the testator's heir could prove that this was not the meaning (cf. D. XXXIII. 1. 120. § 1; 123). The annuity in such cases was always held to expire at the legatee's death (D. XXXIII. 1. 18; 112; 122). The extract from Paulus in D. VII. 9. 16 which deals with a case like ours is apparently somewhat corrupt. See Mommsen's note.

159. Trees blown down but good for timber did not belong to the fructuary so that he could sell them, but they might be used by him for the repair of the farm-house or in other ways, though not for firewood, if such could be got elsewhere on the estate (112. pr.); and the owner could be compelled to remove them if they were in the way (119. § 1). But our text shows that the fructuary is not obliged to replace them or repay their value; as he is in the case of those which die and which then become his property (118).

All the mss. have *substitui*. The Greek commentators are here defective. The sentence, as the mss. give it, is, to say the least, awkward: *arbores euersas ab eo substitui non placet*. (1) The passive *substitui* and *substitutus* are not elsewhere used of the thing whose place is supplied, but of that which supplies the place of another. Cf. 118; 169; 4. 111; xx. 1. 126. § 2; &c. Of some, but less weight are the following objections. (2) *Substitui non placet* means that such a substitution by the fructuary is disapproved of, whereas the passage undoubtedly should mean that there is no obligation on the fructuary to supply the place. Hence for *substitui* we should have expected *substituendas esse*, although the use of the simple present is not impossible. (3) It is not so much the duty of the fructuary during the usufruct which is the subject of this fragment, but the eventual liabilities. Hence I have written *restitui*, which may be taken in two ways, either that supposed to be given by *substitui*, i. e. a physical restoration of the trees or of others in the place of them (which however is open to objections 2 and 3), or the way in which it is used

in the fructuary's bond *id quod inde exstabit restitutum iri* (D. VII. 9. 11. § 7, and notes pp. 59 and 47), which would include not only the surrender of what was left, but compensation for what ought to be there and through his fault was not there. This reading would remove all the difficulties. For the meaning would be the restitution by the fructuary of trees blown down was not approved of, i.e. it did not enter into the settlement by the arbitrator of claims for dilapidations. In either sense *restitui* is preferable to *substitui*. For the physical use of *restitui* cf. Paul. *Sent.* III. 6. § 3 *si domus legata incendio conflagrauerit uel ruina perierit licet postea restituatur*, (the very book from which our extract is taken); Cic. *Top.* 3. § 15, quoted in note on *corruissent*, p. 61.

§ 1. **quidquid in fundo nascitur**] See note on l 9. pr. (p. 67).

**pensiones quoque, &c.**] On the general law affecting leases when there is a change in the ownership of the property see above on l 26 (p. 176). Three cases are possible. The testator may expressly include in the bequest a right to the rents of leased portions of the estate; or he may expressly exclude them; or he may be silent. In the first case the usufructuary must recognise the lease or leases, but he receives the rent: in the second case the lessees remain the heir's tenants and the heir is entitled to the rents: in the third case the fructuary cannot demand the rent, because that is an obligation created by the contract between testator and tenant which is not enforceable by the fructuary. The fructuary can however eject the tenants or call on the heir to do so, and they must seek compensation from the heir.

**exceptae**] sc. *pensiones*. If the rents were expressly excepted from the fructuary, this would be taken to relate not merely to the rents then due, but to the rents generally, and hence to imply the limitation of the fructuary's rights by the existing leases. So far the fructuary would as regards these portions of the estate be in a similar position to that of a usuary (cf. D. VII. 8. 1 10. § 4), except that he could still let his limited right of usufruct and need not use himself.

**conductorem repellere**] 'keep the hirer from the land'. Cf. D. XIX. 2. 1 54. § 1 *inter locatorem fundi et conductorem conuenit, ne intra tempora locationis Seius conductor de fundo inuitus repelleretur*.

§ 2. **caesae harundinis, &c.**] 'profit from cut reeds and stakes'. If stress be laid on *caesae* and it be taken to mean already cut at the time of the legacy's vesting, the decision would be in conflict with the principle of l 27. pr. and of l 58. pr., which principle would give the profit to the heir. Looking at the word *uectigal*, which seems best understood of some regular payment analogous to rent, and to the fact that the general right of the fructuary to take produce of reed beds, &c., and sell it, has been already given in l 9. § 7, I suppose the present law to relate to cases where a reed bed or underwood was regularly cut by some contractor who paid over a certain share, or percentage, or royalty. The fructuary would be intitled to those payments as he would be intitled to rents,

though he was not a party to the contract in virtue of which they are made. The principle of the last section would apply.

160. **cuiuscumque fundi**] Probably this means 'whether the estate be in Italy or the provinces'.

**prohibitus aut deiectus**] The fructuary was not strictly a *possessor*, and therefore if he was prohibited from enjoying or was ejected, he had not a claim to the original interdict *de vi*. But in virtue of his quasi-possession a special interdict was granted him (D. XLIII. 16. l 3. § 13 foll. Vat. Fr. 91). A similar extension of the interdict against a usufructuary is called *utile* (Vat. Fr. 90). The edict however recognised the extension; it was not due merely to interpretation (cf. Schmidt *Interdicten-Verfahren*, pp. 20, 21; Vanger. *Pand.* § 355. anm. 2). The edict used the words '*si prohibeatur uti frui usu fructu fundi*'. The usufructuary must have been in occupation, and must have been either expelled from the land or prevented returning to it. Moveable property came under the protection only as accessory to land. Violence done or threatened to the fructuary, so as to prevent him from using as he chose, founded the right to the interdict (D. l. c. l 11).

**omnium rerum simul occupatarum**] 'all things seized by the defendant at the same time'. The language of the edict was '*de eo quaeque ille tunc ibi habuit iudicium dabo*', and was explained to cover not only the plaintiff's own property but things deposited with him or lent or pledged to him, or of which he had the usufruct or custody, and which were on the premises at the time of the ejection, even though they afterwards perished (D. XLIII. 16. l 1. § 6; 33—38). Apparently *simul* is equivalent to the *tunc ibi* of the edict. But it may also be taken with *agit*, to imply that one action was sufficient to cover the whole plaint. For *occupare* used of such unauthorised taking, see D. l. c. § 29; XLIII. 3. l 1. § 2; VII. 4. l 26. Hence *agri occupatorii* 'squatters' land', Hygin. p. 115; Sic. Fl. p. 138, Lachm.

**medio tempore**] 'meanwhile', i.e. before joinder of issue (*litis contestatio*).

**alio casu**] The inferior MSS. have *aliquo casu* which Mommsen inclines to approve. Krüger adopts it in his edition of Paulus *Sent.* v. 6. § 84. Bas. confirms *alio*: *εἰ δὲ καὶ ἐν τῷ μεταξὺ ἄλλως ἢ χρήσις φθαρήν*. And *alio* seems to me to be right. If the usufruct was lost by non-user in consequence of the eviction, the plaintiff has right to more than the text gives: he can claim against the ejector for the full value of the lost usufruct (D. XLIII. 16. l 10). But if it be lost by some other means (*alio casu*) e.g. by expiration of time, or loss of *caput*, or by death, the ejected person or his heirs can claim only for the value up to the date of the loss (ib. l 3. § 17; cf. l 9. § 1), which presumably is the same as the *percepti antea fructus* of our text.

**aeque**] 'just as much', 'all the same'. So frequently; cf. D. xxiv. 3. l 64. § 4; § 5.



**utilis actio]** The action is *utilis*, because the plaintiff is no longer fructuary. *Aequè* does not mean that this action is *utilis* like the former, but that a right of action exists in this case also, only it is not given in express terms but is analogous to that given in the edict.

§ 1. This section contains nothing to necessitate its reference to cases of violent eviction like the preceding. The words *usus fructus petitur* are those used of the regular action for enforcing the right of usufruct, i.e. the *vindictio ususfructus*, otherwise called the *actio confessoria* (D. VII. 6. l 5). There is nothing to imply that the fructuary has been in possession but rather the contrary. The question is this: How far is the right of the fructuary to be in actual possession affected by a contest between two claimants of the propriety or by his own right to the usufruct being in dispute? First the principle is referred to that the usufructuary's action will lie against any possessor whether he has the propriety or not (cf. D. l. c. *utrum aduersus dominum dumtaxat in rem actio usufructuario competat an etiam aduersus quemuis possessorem, quaeritur. Et Iulianus scribit hanc actionem aduersus quemuis possessorem ei competere*). Then two cases are put. (1) The propriety is in dispute, but the usufructuary's right is not disputed. In this case the disputant who is legally possessor of the object must admit the usufructuary to the *quasi-possessio* or detention. The usufructuary *in possessione esse debet* (cf. D. XLI. 2. l 10. § 1; l 52). The disputant who has the legal possession must by our text give him security not to disturb him. This is in fact the condition on which the praetor assigns to one of the disputants the legal possession. (2) The usufructuary's right is itself disputed by the possessor (whether the propriety be in dispute or not). In this case the possessor must either give security to the claimant of the usufruct for the produce or must allow the claimant himself to be in possession. Presumably in both cases the fructuary or claimant of the usufruct will have to give the usual security (1, 2) for proper use and eventual surrender, but in the second case (2) he will also have to give security for the produce itself if his claim is proved invalid.

**eum cui usus fructus relictus est]** These words appear to be part of the regular bond and leave the question open who is the rightful fructuary. The rightful fructuary, whoever he be, is the only person entitled in that respect to the benefit of the bond.

**quamdiu de iure suo probet]** 'until he (the possessor) knows his right'. *Quamdiu* with present subj. is in other places also used so as to be practically 'until' ('so long as he is proving' = 'until he prove'), infr. l 70. pr.; D. VII. 4. l 15; XLII. 5. l 39. § 1 *eius qui ab hostibus captus est bona uenire non possunt, quamdiu reuertatur*; XLIII. 20. l 7 (which is from the same book of Paulus as our text). The future perfect is found in D. XXIII. 3. l 46. pr.; the present indic. in D. XLVII. 5. l 1. § 3.

If the possessor fails in his proof, then he is out of the case altogether, and has no need to give or continue to give security to the fructuary.

Hence the limit to the security. If he establishes his right, then he is no longer the mere possessor bound to give security to all claimants, but the proprietor answerable only to the general law.

This seems to account for the text, which is confirmed also by Bas. Mommsen however wishes to transpose *satisque ei—de iure suo probet* to the end of the extract. I do not see the advantage of this proposal. Rudorff also rejects it (*Z. R. G.* vi. p. 443).

**si ipsi usufructuario quaestio moueatur]** Similarly *qui de statu eius facerent ei quaestionem* (D. xxxvii. 14. l 5).

**differtur]** The Flor. has *offertur*, but Bas. has *ὑπερίθεται ἡ χρῆσις*, which confirms the inferior mss. in giving *differtur*, and the sense requires it.

**cauere ei debet]** I have written this for the ms. *caueri*, which evidently requires change or addition. The change from *cauere ei* to *caueri* is very slight, and *debet* may have dropt out by confusion with the following *de*. The subject both of *debet* and *percepturus est* will be the possessor, and *percepturus est* is less likely to be understood of the fructuary if *debet* leads up to it. Mommsen corrects *caueri* into *cauetur ei*.

**ipse frui perm.]** sc. *usufructuarius*.

**l 61. rium parietibus imponere]** Bas. *ὀχετὸν ἐπιθεῖναι τοῖς τοίχοις*. Steph. *ῥύακα ἥτοι κατώγειον τοῖς τοίχοις ἐπιτιθέναι* (*κατώγειον* 'basement-room' may perhaps be due to the original text of Neratius, but it is an odd addition in any case). What is meant by *rium imponere* is not clear. It may refer to a new gutter or channel for carrying off the rain-water from one's own or a neighbour's house (cf. D. viii. 2. l 1 *fluminum et stillicidiorum seruitutem impedit*; xviii. 1. l 33 *flumina stillicidia uti nunc sunt, ut ita sint*); or to arrangements for a bath (cf. D. viii. 2. l 19; l 28). Noodt i. cap. 12, refers it to arrangements for water to flow down the walls for coolness' sake and compares Manil. iv. 261 *undas inducere tectis ipsaque conuersis adspargere fluctibus astra*; ib. 265 *et peregrinantes domibus suspendere riuos*; and Sidon. Apoll. xxii. 207. One would have expected more explanation, if this had been meant. Cujac. (Obs. l. 36=tom. i. p. 33 ed. Prati) conjectures *tectorium* (cf. l. 44) for *rium*.

*Imponere* is frequently used of imposing a servitude (e.g. above l 15. § 7; l 19; l 27. § 4), but here it seems to have a physical propriety as well (cf. l 44).

**aedificium inchoatum consummare]** This is in accordance with the principle laid down in l 13. § 7; but is a point which required distinct decision.

**sed nec eius, &c.]** Understand *placet*. 'And in fact in such a case it is held that no usufruct is possible'.

**in constituendo]** See l 3. pr.

**utrumque]** i.e. *nouum rium imponere* and *aedif. inchoatum consummare*.

**l 62.** Mommsen, following the Greeks, which have *δύναται* (in the text

of Bas. οὐ δύναται appears to be the ms. reading), suggests the insertion of *posse* before *possessionis*. No doubt it might easily have been lost there, but the position is awkward between *montibus* and its dependent genitive. It would be better placed after *possessionis* and probably as easily omitted. Steph. recognises *probe*, so that is not a substitute for *posse* (Mommson ad D. xvii. 2. l 30 suggests there reading *probe* for *posse*). I do not think however that *posse* is required either by the sense or by the Greek version. 'Hunts' may stand for 'may hunt'. Thus in l 7. § 2 we have *reficere cogi* several times, in l 9. § 1 *cogi posse recte colere*.

**in saltibus uel montibus]** It was not uncommon for estates to have a piece of woodland on the hills attached to them. Cf. Frontin. Gromat. p. 48 *sunt plerumque agri, ut in Campania, in Suessano, culti, qui habent in monte Massico plagas siluarum determinatus*; also pp. 15; 204.

**possessionis]** 'a landed estate'. Cf. D. iv. 4. l 38. pr., where the word is used as synonymous with *fundus* and other places quoted above on l 27. § 3 *possessores* (p. 183). It is frequent in the *Gromatici*, e.g. p. 49 *nam per emptiones quasdam solet proprietates quarundam possessionum ad priuatas personas pertinere*; pp. 130; 201; &c.

**probe dicitur]** 'it is fairly asserted', i.e. the equity of the case demands it. *Recte dicitur* would be 'the opinion is legally right' (see above on l 9. pr. p. 68). *Probe* has generally the meaning of 'decently', 'properly', opposed to *improbe*. Cf. D. xx. 4. l 1. pr.; xxxvi. 1. l 28 (27). § 4; xxxviii. 1. l 7. § 3; xlvii. 2. l 43. § 9.

Wild animals are not the property of any one, but become by general law (*iure gentium*) the property of the captor whoever he be and wherever he captures them (D. xli. 1. ll 1—3). There is no restriction on the right to hunt and fish, but to go on private land or interfere with private lakes is a trespass in a hunter or fisher just as in the case of any one else (D. xlvii. 10. l 13. § 7; and xli. l. c.). Why then should there be any question of the right of the usufructuary? For this reason, that wild animals are not properly produce (*fructus*), and hunting therefore so far does not belong to the fructuary more than to any one else. If however land of which the only produce is the game is the subject of the usufruct, the fructuary is entitled to this produce, whether he hunts it himself or lets it out and takes the rent instead (D. xxii. 1. l 26; supr. l 9. § 5). Our present passage adds to this that the same principle applies where the hunting ground is an adjunct to or part of an estate which, or the bulk of which, is otherwise profitable. The usufructuary by being alone entitled to the *de facto* possession of the land is alone in a position to hunt without trespass, and to exclude others from hunting on the land in question. The use of the land for hunting may be let out to some one, and then the title to the rent is on the same footing as the title to an ordinary occupation rent, or to a royalty or other payment for cutting stakes (l 59). The fructuary's right to exclude even the owner from hunting would be the same as his right to exclude him from a joint use of a house or any other thing,



and is no more inconsistent with the general right of hunting than the general law of trespass is. The general right of hunting is indeed strictly considered nothing more than the non-existence of private property in wild animals till caught, and the acknowledgment of the right of property in them when caught.

The usufructuary's remedy to prevent trespass is his regular action *confessoria*, just as the owner's remedy is *actio negatoria*. It is said by writers of great authority (e.g. Donell. *Comment.* ix. 5. § 24=II. p. 1292, ed. 1841; Wächter *Pand.* § 134 and *Beilage*) that owner and usufructuary have an *actio iniuriarum* against the trespasser, and they rely on D. XLVII. 10. l 13. § 7; which however seems to refer to a different thing altogether, viz. to an action in favour of persons prevented from hunting and fishing in public places where they have an equal right with others. On the right of hunting generally, see some recent discussions by Schirmer *Z. R. G.* xl. 311 sqq.; xvi. 23 sqq. and Wächter l. c.

**nec...proprium domini capit]** i.e. a wild boar or stag is not the property of the owner of the land on which it is captured: *nullius est sed occupanti conceditur* (D. XLI. 1. l 3. pr.).

**sed aut fructus iure aut gentium suos facit]** Mommsen has thus transposed the Florentine reading *sed fructus aut iure aut gentium*. *Fructus iure* is in itself I think an unusual expression, and the order with *iure* is generally reversed (e.g. *non iure seminis sed iure soli*, D. XXII. 1. l 25. pr.). Moreover its contrast with a somewhat different expression (*iure gentium*), and the use of *suos* applied to *aprum aut ceruum*, after the singular *proprium* has been used, are not satisfactory: but the emendation is simple, and the meaning is supported by Steph. and appears to be right. Schirmer l. c. discusses whether the *ius fructus* and *ius gentium* are concurrent or mutually exclusive grounds, and decides for the latter alternative as required by the use of *aut...aut*, instead of *uel...uel*, or *partim...partim*. The *ius fructus* is therefore, according to him, to apply where the *fructus fundi ex uenatione constat* (D. XXII. 1. l 26), and the *ius gentium* in all other cases. But the *ius gentium* must apply in all cases and is therefore concurrent in the case specially mentioned. *Aut...aut* implies that the two rights are different (therefore not *uel...uel*) and that they are each sufficient (therefore not *partim...partim*), but does not exclude the possibility of a man's sometimes having two strings to his bow. Compare the preceding line (*aprum aut ceruum*) and D. III. 1. l 1. § 3 *in quo edicto aut pueritiam aut casum excusauit* (a boy may be also deaf). The ambiguity of *aut* in some classes of expressions is pointed out in D. L. 16. l 124, and formed the subject of a law of Justinian (Cod. VI. 38. l 4). Godefroi has from the inferior MSS. *fructus aut iure civili aut gentium*.

§ 1. **uiuariis]** 'preserves'. In D. XLI. 2. l 3. § 14 they are distinguished from enclosed woods and compared to *piscinae* for fish. Beasts in *uiuaria* were possessed: in woods were not possessed. Pliny speaks of *uiuaria* for wild boars, &c. first being established by Fulvius Lippinus and

afterwards by L. Lucullus and Q. Hortensius (*H. N.* VIII. § 211); also for deer (§ 115); and dormice (*glires*, § 224). Varro speaks of them under the name of *leporaria*, *non ea quae tritavi nostri dicebant ubi soliti lepores sint, sed omnia septa, afficta uillae quae sunt, et habent inclusa animalia* (*R. R.* III. 3. § 2; § 8; cf. 12. § 1). At Hortensius' villa *silua erat supra quinquaginta iugerum maceria septa, quod non leporarium sed θηροτροφεῖον appellabat* (ib. 13. § 2). So also Columella VIII. 1. § 4; and IX. praef. *Mos antiquus lepusculis capreisque ac subus feris iuxta uillam plerumque subiecta domini iis habitationibus ponebat uiuaria, ut et conspectu suo clausa uenatio possidentis oblectaret oculos et, cum exegisset usus epularum, uelut e cella promeretur*. He also describes the mode of inclosing *latissimas regiones tractusque montium* with oaken posts (*uacerrae*) and horizontal poles, in which enclosures were deer, antelopes (*oryges*), roedeer, stags and boars, and speaks of them as kept by some for hunting, by others *quaestui ac redditibus*. Gellius (II. 20) quotes Scipio as having called the enclosures *roboraria*. Seneca speaks of slaves being thrown into *uiuaria* of serpents (*Clem.* I. 20). Gratianus used to shoot at beasts *inter saepta quae appellantur uiuaria* (*Ammian.* XXXI. 10. § 19). Cf. *Hor. Ep.* I. 1. 79; *Juv.* III. 308. The word is frequently used of fish-ponds (specifically called *piscinae* *Colum.* VIII. 16, 17). See *Juv.* IV. 51 and Mayor's note; *Plin. H. N.* IX. 168—173; Göll's Becker's *Gall.* III. p. 54; and, on the times at which different animals were introduced to Rome, Friedländer *Sittengeschichte*, II. pp. 489 foll. ed. 5.

**exercere**] 'train'. Bas. translates γυμνάζειν, i.e. 'train for public shows'. Perhaps hunting like the Windsor stag-hunts, so as not to kill or hurt, might come under the word. Noodt I. cap. 7 takes it in the same sense as *nauem exercere* (*D.* IV. 9. 11. § 2), *cauponam uel stabulum exercere* (ib. § 5), *fodinas exercere* (*h. t.* I. 13. § 5), *exercere possessionem fundi* (*D.* XXXIII. 7. 112. pr.), i.e. to work for profit. But this would not naturally be suggested by *feras exercere*.

**possit**] The sentence may be regarded as a dependent question, as we say, 'query, whether we may hunt them but may not kill them'. It is however simpler to take *possit* and *sint* as hypothetical subjunctives. So *D.* XLVII. 10. 17. § 1 *Si dicatur homo iniuria occisus, numquid non debeat permitttere praetor priuato iudicio legi Corneliae praeiudicari*; XLVI. 3. 198. § 6; &c.

**alias**] attracted into the case of *quas*, and hence *hae* is expressed with the apodosis. *Aliae* would have been simpler.

**initio**] i.e. 'at the commencement of the usufruct'. As however the same principles would apply to any other additions to the menagerie during the course of the usufruct, Mommsen suggests that *initio* has been wrongly inserted as a contrast to *post*, which last alone is supported by Bas. In the stereotype edition he suggests, as an alternative reading, *inibi* for *initio*. But see next note but one.

**post**] μετὰ τὴν σύστασιν τῆς χρήσεως, Bas. 'after the usufruct has been established'.

**siue et ipsae inciderint]** The MSS. have *sibimet* which would be used here in a very unusual way, apparently only to strengthen *ipsae*. The only parallel to this that I can find is D. XLIII. 20. l 1. § 21 *Si aqua influxerit ipsa sibi me non ducente* where the inferior MSS. have *sibimet* and Mommsen suggests *sibimet non ducenti*. *Sibi inciderint* might be applied to a herd tumbling over one another into the pit, but there is no pertinency in emphasizing such a mode of entrance into the *uiuarium*. The nearest general analogy is *suum sibi*; e.g. Colum. 11 fin. *uas ne perurantur suo sibi pampino tegito*; Lat. Gr. § 1143. The reading which I have given is a very slight change of letters (*v* and *b* being commonly confused in mss.) and gets rid both of this difficulty and of the difficulty about *initio*. Bas. takes *post* with *inciderint*; Steph. takes it with *incluserit*.

*Incidere* is often used of falling into a snare &c., D. IX. 2. l 29. pr. *Si pecus vicini in eos laqueos incidisset*; XLIII. 24. l 7. § 8 *si bos meus in fossam inciderit*. *Delapsae* probably has special reference to the *uiuarium* being constructed as a pit or underneath a high bank so that animals moving on or near the edge would fall into it.

**fructuarii iuris sint]** 'be at the disposal of the fructuary'.

**commodissime sufficit]** A short expression for 'the most convenient principle is that it should be sufficient'. Cf. *commodissime dici ait non esse cogendum* (D. XVI. 3. l 1. § 37); *commodissime id statuatur ut*, &c. (D. XXIX. 1. l 18. pr.).

**ne per...incertum sit]** 'lest the difficulty of distinguishing between them should make uncertain the fructuary's rights with regard to the several animals'. *Facultatis ius* seems to be put for 'rightful powers' and *fructuarii facultas* is in effect equivalent to *facultas utendi fruendi*: cf. Ulpian XXIV. 26 *ususfructus legari potest iure civili earum rerum quarum salua substantia utendi fruendi potest esse facultas*. See note on l 9. § 7 *facultas*, p. 75.

**per singula animalia]** like *per singula genera* below, is 'taking the several animals one after another'; 'going through them' so as to say which belongs to the original stock and which is an addition by the fructuary. For this use of *per* cf. Grom. p. 146 *unicuique possessori per singulos agros certa spatia adsignantur quae suis impensis tueantur*, i.e. each occupier in the several districts has certain lengths of road assigned him to repair; p. 205 *His omnibus agris uestigal est ad modum ubertatis per singula iugera constitutum*.

**sufficit, &c.]** The solution is given as a practical one. In strict law the original stock would belong to the proprietor, unless they escaped, and the subsequent additions would, by the general law of capture, belong to the fructuary. Whether the offspring of the original stock would, as in a herd of sheep, belong to the fructuary subject to the duty of keeping up the herd, may be doubtful as the animals are wild, but Tryphoninus here practically applies to the menagerie the same principles that apply to a herd of sheep. See below on l 68 sqq.



**quoque]** i.e. not merely the same total number but the same number of each kind.

**adsignare]** 'assign', 'make over', 'allot'. The word is frequently used in this sense, no actual marking or sealing being implied, though this was probably the original meaning. Any action which indicated the appropriation of things to a particular person would presumably suffice. It is used (1) of making out and allotting particular lands to veterans or others, e.g. in *lex Agraria* (Bruns, p. 69), *quod agri iuvir dedit adsignavit*; D. vi. 1. l 15; &c.; (2) of assigning the several parts or articles of an estate to the several heirs, D. x. 2. l 22. § 1; and especially (3) of assigning the several freedmen to the several children who would then on the father's death become their patrons (D. xxxviii. 4): of this it is said *adsignare quis potest quibuscumque uerbis uel nutu uel testamento uel codicillis uel uiuus* (ib. l 1. § 3); (4) of a husband appropriating to his wife certain slaves or articles for her use (D. xxxii. l 45—l 49); and in other like applications. With the present passage comp. D. xxxvii. 9. l 1. § 24 *Quod si nondum sit curator (uentris in possessionem missae) constitutus, Seruius aiebat res hereditarias heredem obsignare non debere, sed tantum pernumerare et mulieri adsignare.*

l 63. This law refers to the case of a man granting the usufruct of an estate of which he is the owner at a time when the usufruct is lying out in another man. The actual exercise of the right so granted would come into play only on the loss of it by the present holder. That this is the meaning of the law is confirmed by Bas. τὴν γὰρ χρῆσιν τοῦ ἀγροῦ μου, ἥν ἔτερος ἔχει, παραχωρεῖν ἄλλῳ δύναμαι. And so the commentators, only that Stephanus also mentions as possible another explanation, viz. that an owner in establishing a usufruct is conveying what is not his, because the enjoyment is not with him a separate servitude (cf. D. vii. 6. l 5. pr.). But this explanation would make the law into a mere empty riddle and be inconsistent with its place in Paulus' treatise *de iure singulari* from which it is extracted. l 72 gives a similar rule respecting bequests of usufruct.

**quod nostrum non est, &c.]** This apparently contradicts D. l. 17. l 54 *nemo plus iuris ad alium transferre potest, quam ipse haberet*. No doubt that is the reason for the case being treated in Paulus' work *de iure singulari*, which Paulus defined thus, *ius singulare est quod contra rationem iuris propter aliquam utilitatem auctoritate constituentium introductum est* (D. i. 3. l 16). A similarly epigrammatic statement of an allied case is given by Ulpian in D. xli. 1. l 46 *non est nouum ut qui dominium non habeat alii dominium praebeat: nam et creditor pignus uendendo causam dominii praestat, quam ipse non habuit*.

**cedere]** Paulus no doubt meant *in iure cedere* (Gai. ii. 24; 30). Surrender in court and mancipation were old statutable actions, and such did not admit of limitations of time and condition (D. l. 17. l 77). Accordingly doubts were entertained (see above, p. 196) whether a usufruct could

be constituted by surrender in court to commence from a future time, and Paulus thought not (*Ex certo tempore legari possit: an in iure cedi uel adjudicari possit uariatur; uideamus ne non possit, quia nulla legis actio prodita est de futuro*, Vat. Fr. 49). In 14 of this title a fragment from Paulus says *usufructus uel praesens uel ex die dari potest*. Probably this has undergone alteration by Tribonian. See Glück ix. 194, who treats the case in our text as an example of such an establishment of a usufruct *ex die*. But unless we suppose Paulus to have altered his opinion, Paulus could not have so regarded it. I think the following view is in better harmony with the circumstances. The surrender in court takes effect at once. The usufruct is actually established in the person of the surrenderee with the consequence that it will perish if he die or suffer *capitis deminutio*, or do not use it. As however another has a prior right to the usufruct the surrenderee cannot actually exercise his newly acquired right. At first sight it seems strange to imagine that a surrender would take place in these circumstances. But a surrender was the only legal form at the time for the purpose and it did not require delivery to perfect it. It may well be that the illness of the surrenderor or his intended absence from the country or the anticipated speedy loss of usufruct by the present holder made immediate action desirable and inconvenience improbable. The surrenderor could guard himself by an agreement with the surrenderee, that no action should be brought for the enjoyment of the usufruct until the present holder lost it. A case in which the seller had not disclosed the fact of the usufruct being out in another is mentioned in D. xxi. 2. 146. pr. In the case supposed here there is no concealment and there is no postponement of the legal effect of the surrender. Hence I take it the surrenderor would not be liable to the surrenderee for the want of immediate possession, nor would the *actus legitimus* be in itself subject to any limitation of time. For an instance of strict law being regarded while yet it is in effect modifiable by agreement, see note on 115. § 7 *Proprietatis*, &c. (p. 124 foll.). Under Justinian usufructs could be established by mere contract, which could be adapted to any circumstances, and so the difficulties of the old law vanished.

164. The fructuary can avoid the duty of repairing a house of which he has the usufruct given him by abandoning the usufruct altogether. But (165) he is still liable for repairs of damage caused by his own or his agent's action (cf. 148. pr.). On the duty of repairs see 17. § 2 (p. 61).

**derelinquere**] Similarly necessary heirs (so-called) might abandon the inheritance and thus cease to be liable to the creditors (D. xxix. 2. 157). But abandonment did not in other cases always secure freedom from the claims of creditors (D. xlviii. 23. 12).

**in quibus casibus**] 'that is to say, in those cases in which'. Mommsen suggests *scilicet* for *et*. A similar mode of expression occurs in D. xxvii. 6. 11. § 4. Cf. xxxvii. 9. 11. § 14. If the fructuary is bound to repair, he has it seems the option of abandoning the usufruct. In other cases he is

not bound to repair and may decline to do so without being under any necessity to give up his right.

**post acceptum iudicium]** 'after acceptance of trial'. In the formula process the conclusion of the formal pleadings was the statement by the Praetor of the issue to be tried. This joinder of issue was denoted (see Keller *Litis Cont.* § 6) on the part of the plaintiff by *litem* (*iudicium, actionem*) *contestari*; on the part of the defendant by *iudicium accipere, suscipere, actionem accipere, excipere, suscipere, litem suscipere*, &c. But *litem contestari* is also used of the defendant (Cic. *Att.* xvi. 15. § 2; Fest. s. v. *contestari*; D. iv. 8. 1 32. § 9); and *iudicium accipere* of the plaintiff (D. ix. 4. 1 39. § 3; cf. xxi. 1. 1 21. § 2).

**absolui eum debere]** That compliance with the plaintiff's demand entitled the defendant to acquittal even after issue was joined was affirmed by Sabinus and Cassius to apply in every suit, and this view was adopted by Justinian (*Inst.* iv. 12. § 2). The other school of jurists made some exceptions, but the defective condition of the ms. of Gaius prevents any certainty on this point (Gai. iv. 114). For the general doctrine see also Gai. iii. 180; and Dig. xxxix. 4. 1 5; Keller *Civil-Proz.* § 67. In the present case the same result is to follow from the willingness of the usufructuary to abandon his usufruct.

165. **quod diligens pater familias...facit]** Comp. 1 9. pr. *ut boni viri arbitratu fruatur*; § 2 *usurum quasi bonum patremfamilias*. Two kinds or grades of care, and correspondingly of fault, were recognised by the Romans, and are mentioned in D. x. 2. 1 24. § 16 *Non tantum dolum, sed et culpam in re hereditaria praestare debet coheres, quoniam cum coherede non contrahimus, sed incidimus in eum: non tamen diligentiam praestare debet, qualem diligens paterfamilias,...(sed) qualem in suis rebus*. Neglect of the latter would be *culpa levis*; neglect of the former (*qualem diligens p.*) would be *culpa lata*. There is no practical distinction between *exacta diligentia, omnis diligentia, qualem diligentissimus paterfamilias*, and that in the text. (See e.g. Wächter *Pand.* § 87.) Our passages are discussed in Hasse *Culpa* § 89.

§ 1. The testator bequeaths the usufruct as it is: the heir has, without special words, no obligation except to put the legatee in possession. Cf. 1 7. § 2.

166. For the Aquilian action against (*cum*) the usufructuary see 1 13. § 2; 1 15. § 3; for the analogous action given to the usufructuary 1 17. § 3.

**serui corrupti]** See D. xi. 3. The action was granted by the Praetor against any one who maliciously harboured another's slave or persuaded him to any wrong act so as to make him worse. The penalty was double the amount of the damage (*quanti ea res erit*, cf. 1 1) at the time of his being corrupted or harboured (1 5. § 4). The double penalty was exacted even when the defendant confessed: which was not the case in a proceeding on the Aquilian statute (1 5. § 2). The action was applicable to all cases of corrupting slaves *Si in seruo ego habeam usum fructum*,



*tu proprietatem, si quidem a me sit deterior factus, poteris necum experiri; si tu id feceris, ego agere utili actione possum: ad omnes enim corruptelas haec actio pertinet* (19. § 1). If a slave was the offender, he might be surrendered *noxae* in lieu of damages (15. § 4).

**iniuriarum]** (a) A right of action for outrage was given by the XII tables. Broken limbs and blows were punished with fines; libel with death. The Praetors developed the action and modified the penalty, leaving it to the judge to fix (Gell. xx. 1. § 12 sqq.; 31 sqq.). Outrage included all acts of purposed insult to the person either of oneself or of those under one's power, or to one's personal dignity or reputation. Blows, forcible entry into one's house, attempts at seduction, indecent address to women, withdrawal of their attendants, pelting with mud, libel, public abuse, attacks on reputation by treating a man as a debtor who is not so, or advertising his goods for sale, wrongfully putting a slave to the torture with a view to insult his master, and many other acts gave this right of action (Gai. iv. 220—225; Paul. *Sent.* v. 4; D. XLVII. 10; cf. Keller *Inst.* § 162). The right remained even if the owner had parted with the slave or set him free (D. L. 3. 1 29). The damages were assessed by the injured party, subject to reduction by the judges (Gai. III. 224).

(b) The statement in the text however appears to be in conflict with D. XLVII. 10. 1 15. § 37, where in commenting on the edict *Qui servum alienum adversus bonos mores uerberavisse, deinde eo iniussu domini quaestionem habuisse, dicetur, in eum iudicium dabo* Ulpian says *Nec si fructuarius id fecerit* [i.e. *uerberaverit*], *dominus cum eo agit, uel si proprietarius fecerit, fructuarius eum conveniet*. No doubt strictly these words only relate to *uerberare*, but the context does not apparently justify any distinction in this point of view between beating and putting to question with torture. Probably Paulus is referring to excessive torture, or torture without reasonable ground (cf. D. XLVII. 10. 1 15. § 42), and Ulpian is denying the responsibility of fructuary to owner or of owner to fructuary for beating (or torturing) a slave in circumstances which justify an owner or quasi-owner, and do not justify a third person. Indeed it would be unlikely that a fructuary should injure the slave, of which he had the use, with the intention of thereby insulting the owner.

(c) Several actions being thus open to the injured party, the question arose whether he might use one only or all. Some held that the plaintiff had to elect which he should take, and the right to bring the others thus dropped (*altera electa alteram consumi*). Paulus says (or is made to say in the Digest XLIV. 7. 1 34. pr.), that it was eventually held that he might bring which action he pleased without thereby forfeiting his right to bring another, but the damages in the second action would be cut down to so much only as exceeded what he recovered in the first action (ib. 1 32; 1 34; 1 41; 1 53). This applied when it was the same deed which formed the subject of all the actions. Repeated acts subjected the offender to repeated suits. In the three kinds of actions mentioned here there

was a different basis for assessment of damages for each: in the action on the Aquilian statute it was the greatest value of the slave in himself and what would have accrued to him during the preceding twelve months; in the action for corrupting the slave, it was double the actual deterioration, bodily or mental, of the slave at the time of the act; in the action for insult it might evidently be aggravated by circumstances which were independent of the positive damage, but concerned the honour and reputation of the plaintiff or his family.

1 67. Any usufruct can be sold (1 12. § 2), and the heir has no more right to control the sale or have a veto on the purchaser than has any other bare proprietor. Here however the point seems to be whether a usufruct bequeathed can be sold to a stranger; whether, in fact, it should not be regarded as simply a temporary provision for a member of the family.

**extraneo]** i.e. a stranger to the family of the testator. The meaning of *extraneus* 'an outsider' depends on the context. Thus e.g. it is used of one who is not *ex numero liberorum* (D. L. 12. 1 14); so *extraneus heres siue ex suis* (D. XXIX. 5. 1 6. § 1); opposed to *qui in potestate est* (D. XLVIII. 10. 1 10; and 1 46 above); of one who does not owe a freedman's duty to a patron (D. XXXVII. 15. 1 8); of one who has no rights in an estate, *si arbores in fundo, cuius usus fructus ad Titium pertinet, ab extraneo vel a proprietario succisae fuerint* (D. XLIII. 24. 1 13); of one who is bound by no confidential relation, and therefore is free to contract a purchase (D. XVII. 1. 1 59. § 1), or loan (D. XXVI. 7. 1 54); &c.

1 68. **uetus fuit quaestio]** Cicero refers to this in *Fin.* I. 4. § 12 *An, partus ancillae sitne in fructu habendus, disseretur inter principes civitatis P. Scaeuolam M.que Manlium ab iisque M. Brutus dissentiet, haec quae uitam continent negligentur?* At the time of the lawyers of the Digest the point was settled in favour of the opinion of Brutus. *Partus ancillae* was not regarded as *in fructu*. It was not produce which the fructuary or husband or *bona fide possessor* could claim as his own; D. XXII. 1. 1 28 (Gaius) *In pecudum fructu etiam fetus est, sicut lac et pilus et lana: itaque agni et haedi et vituli statim pleno iure sunt bonae fidei possessoris et fructuarii. Partus uero ancillae in fructu non est; itaque ad dominum proprietatis pertinet;* XXIII. 3. 1 10. §§ 3, 4 *Si serui subolem ediderunt, mariti lucrum non est* (otherwise, if the dowry was valued to the husband; ib. 1 18). *Sed fetus dotalium pecorum ad maritum pertinent, quia fructibus computantur;* ib. 1 69. § 9; XXXVI. 1. 1 23 (22). § 3 (Ulp.) *praeterea (reddentur) si qui partus extant et partuum partus, quia in fructibus hi non habentur;* XLVII. 2. 1 48. § 6 *Ex furtiuis equis nati statim ad bonae fidei emptorem pertinebunt; merito, quia in fructu numerantur: at partus ancillae non numeratur in fructu;* Paul. *Sent.* III. 6. § 19. But the matter was not so obvious but what a man might, if he had the usufruct of a female slave, honestly alienate the offspring without being charged with theft (D. XLI. 3. 1 36. § 1, and Gai. *Inst.* II. 50). The

produce belonged to the owner of the slave, and consequently went with the slave or with the estate of which it was part (D. iv. 2. l 12; v. 3. l 27. pr.; vi. 1. l 17. § 1; xxiv. 3. l 31. § 4; xxxv. 2. l 30. pr.; xlii. 8. l 10. § 21). When a woman slave was the subject of, or was included in, a bequest, whether direct or by way of trust, any offspring, born after the heir was chargeable with delay, had to be given up along with the mother (D. xxii. 1. l 14. pr.; xxx. l 91. § 7), but whether offspring born before the vesting of the bequest could be retained by the heir, or must be given up to the legatee, was decided differently by the lawyers. Papinian held that they must be given up (xxxvi. 1. l 60. (58.) § 4; cf. xxxiii. 7. l 3. pr.), and Ulpian apparently took the same view (xxxvi. 1. l 23. (22.) § 3). Neratius Priscus and Paulus held that the heir could claim them (xxii. 1. l 14. § 1; xxxv. 2. l 24. § 1), and Scaevola decided two cases in the same sense, though perhaps the decision was influenced by the precise wording of the will (xxxii. l 41. § 10; xxxiii. 5. l 21). Both Papinian and Paulus agree in not reckoning *partus ancillarum* as coming in such cases under the term *reditus*. See Cujac. *in lib. ix. respons. Papin.* (iv. p. 2441, ed. 1837). The reconciliation suggested by Donell. *Jur. Civ.* vii. 26. § 8 (ii. p. 668, ed. 1841) is quite arbitrary.

**partus**] sc. *ancillarum*. Probably Ulpian had been treating of usufruct in slaves just before. The two last fragments from this 17th book *ad Sabinum* (l 21, l 23) are concerned with that. Moreover *partus*, though in lay writers applied to animals as well as to children, seems almost restricted to the offspring of women in the law writers. At least Dirksen and Heumann contain no passage in which *partus* is used of animals except D. v. 3. l 25. § 20 *augent hereditatem gregum et pecorum partus*, and xxiv. 3. l 7. § 9 where *prope partum* is used for 'near lambing', but *fetus pecorum* for the lambs, &c.

**sententia optinuit**] Brutus' opinion prevailed. For this use of *optineo* cf. Liv. xxi. 46 fin. *quod et plures tradidere auctores et fama obtinuit*; Sall. *ad Caes.* i. 1; Dig. i. 16. l 7. pr. *Debet ferias secundum mores et consuetudinem, quae retro optinuit, dare*; xxx. l 127; *optinuit Galli sententia alienos quoque postumos legitimos nobis heredes fieri*, &c.

**fructuarium**, &c.] Mommsen suggests that *ius* should be inserted after *optinuit*; why, I do not know; apparently he means it to be taken with *fructuarium*. But the fructuary, just as well as the right of the fructuary, may be said to have no place in regard to the offspring, if he cannot claim it.

**neque enim in fructu**, &c.] This is not given as the reason urged by Brutus, but apparently as Ulpian's own. In D. v. 3. l 27. pr. he gives another, *quia non temere ancillae eius rei causa comparantur ut pariant*. Gaius (followed by Justinian *Inst.* ii. 1. § 37) gives another, *absurdum uidebatur hominem in fructu esse, cum omnes fructus rerum natura hominum gratia comparauerit* (D. xxii. 1. l 28. § 1). This last view is founded on the doctrine of Aristot. *Polit.* i. 8 οὐκ ἔστιν τὰ τε φυτὰ τῶν ζώων ἕνεκεν εἶναι καὶ



τὰ ἄλλα ζῶα τῶν ἀνθρώπων χάριν, and εἰ οὖν ἡ φύσις μηδὲν μῆτε ἀτελὲς ποιεῖ μῆτε μάτην, ἀναγκαῖον τῶν ἀνθρώπων ἕνεκεν αὐτὰ πάντα πεποιηκῆναι τὴν φύσιν, and attributed to the Stoics by Lucret. II. 174 *genus...humanum quorum omnia causa constituisse deos fingunt*; ib. v. 157; Cic. *Legg.* I. 8. § 25 *Itaque ad hominum commoditates et usus tantam rerum ubertatem natura largita est*; so that not only plants but animals are produced for man's use. (More in Schrader *ad Inst.* l. c.) Schrader also refers to the language of Paulus (D. XXI. 1. l 44. pr.) *Iustissime aediles noluerunt hominem ei rei quae minoris esset accedere...ut ait Pedius, propter dignitatem hominis...ceterum hominis uenditioni quidvis adicere licet*. Böcking understands and approves the reason given in our passage as resting on the principle that a slave gained for the fructuary only *ex re fructuarii* or *ex operis suis*, and the offspring coming under neither head consequently falls to the owner. But the limitation of the principle itself requires explanation. Why is a lamb the property of the fructuary and a child not? I think the natural explanation is that, wars being frequent and the slave trade perfectly open, the Romans looked rather to getting their slaves ready grown, and not to breeding them. And when they did breed them, it was apparently for their own use on the estate, and not for sale. (Cf. Varr. *R. R.* II. 10; ib. 1; Colum. I. 8. § 19, &c.) If the child of a slave-woman was to be taken as his own by one who like a fructuary or *bona fide possessor* had only a life interest or temporary connexion, it meant separation from the slave's family and from the estate. It would be a breach of the domestic character of the institution, and thus not suited to the character of usufruct as a temporary provision for the member of a family, and unnecessarily favourable to a mere intruder like a *bona fide possessor*. And no doubt there was a natural willingness on the part of the lawyers to recognise a distinction between a boy or girl on the one hand, and on the other hand a foal, or calf, or lamb, or puppy, which he might kill or even consume at pleasure. A slave was legally a thing, a chattel, but he was *de facto* a person, with a possibility, frequently realised before their eyes, of becoming legally a person. The law was full of regulations and principles derived from this mixed character so that an anomaly is to be expected.

**hac ratione nec usum fructum, &c.]** 'on this principle the fructuary will not have a usufruct any more than he has a property in the child'. A fructuary could use what he found, and vegetable fruits he could gather and consume (l 27. pr.). Any produce coming into being afterwards he could as a rule take also as his own, whether the young of animals, the fruits of trees and other vegetable crops, or the produce of mines and quarries. Gradual increments such as the growth of trees, alluvial deposits, the increased strength, capabilities and value of the estate or thing or creatures, he could use and employ. But a child born after his usufruct commenced was under none of these classes. The law said he was not a *fructus*, and yet he was a separate and individual thing. So it was held, as in the case of an island rising in the river and adjacent

to an estate, that it belonged indeed to the owner of the estate or the mother, but was not subject to the usufruct. But express words would of course give the fructuary a usufruct in the *partus* as well as in the *ancilla*. Maianus. *ad xxx Iuriscons. l. 130* takes wrongly *in eo* to mean *in homine*, not *in partu*.

**cum possit partus legari]** There is nothing to prevent a bequest of (the ownership of) a slave's (future) offspring being valid, and hence there was no objection to a bequest of the usufruct of a slave's (future) offspring. The only objection to the former that appears possible is that the offspring was future and uncertain. This was an objection before the Sc. Neronianum to a legacy *per vindicationem*, but not to a legacy *per damnationem*. Cf. Gai. III. 203 *ea quoque res quae in rerum natura non est, si modo futura est* (=esse potest?), *per damnationem legari potest, uelut 'fructus qui in illo fundo nati erunt', aut 'quod ex illa ancilla natum erit'*; D. XXX. l. 24. pr.; l. 63; XXXI. l. 73; XXXV. l. 1 l. 1. § 3.

§ 1. **fetus tamen pecorum, &c.]** See D. XXII. l. 1 l. 28 quoted above (p. 240 *uctus fuit quaestio*). *Fetus pecorum* is frequently named besides, and thus opposed to *partus ancillarum*, &c. D. IV. 2. l. 12. pr.; XX. l. 1 l. 15. pr.; XXIII. 3. l. 10. § 2, § 3, § 18; XXXVI. l. 1 l. 60 (58) § 4; XLI. 3. l. 4. § 5; Paul. *Sent.* II. 17. § 7 (cf. ib. 5. § 2 *fetus uel partus eius rei quae pignori data est*): III. 6. § 20; Cod. v. 13. § 9; and *fetus* is in other places applied to animals, e.g. XXII. l. 1 l. 39; XLI. l. 1 l. 48. § 2. On the indiscriminate use of *pecud-* and *pecor-* see above on l. 3. § 1 *iumentis*, p. 39.

§ 2. **gregis uel armenti]** Cf. l. 70. § 3 *gregis uel armenti uel equitii*; D. VI. l. 1 l. 1. § 3 *Posse gregem vindicari Pomponius scribit. Idem et de armento et de equitio ceterisque quae gregatim habentur dicendum est. Grex* is itself quite general. Varro uses it of sheep (*R. R.* II. 1. § 16), goats (ib. 3. § 1), pigs (4. § 3), oxen (5. § 5), asses (6. § 2), horses (7. § 1), mules (8. § 6), peacocks (III. 6. § 1), geese (10. § 1), ducks (11. § 1); and in the Digest it is applied to oxen (XXX. l. 22) and to horses (XLVII. 14. l. 1. § 1), though sometimes distinguished from them as above.

*Armentum* properly 'plough-beast' is generally used of the larger cattle, especially of oxen, in herds, e.g. *Qui gregem armentorum emere uult* (Varr. *R. R.* II. 5. § 7) and opposed to the tame oxen (ib. l. 1. § 4). Vergil after speaking of oxen and horses says (*G.* III. 286) *hoc satis armentis: superat pars altera curae, lanigeros agitare greges hirtasque capellas*. He also uses it of deer (*Aen.* I. 185). Pomponius (Dig. I. 16. l. 89) says *Boues magis armentorum quam iumentorum generis appellantur*, and Modestinus (D. XXXII. l. 81. §§ 2—5) *Pecudibus legatis et boues et cetera iumenta continentur, armento autem legato etiam boues* (Mommсен suggests *et iumenta et boues*) *contineri conuenit, non etiam greges ouium et caprarum. Ouibus legatis neque agnos neque arietes contineri quidam recte existimant; ouium uero grege legato et arietes et agnos deberi nemo dubitat.*

**adgnatis]** 'those born to the flock', i.e. subsequent to its formation. Cf. D. XXXIII. 7. l. 28 *Quacsitum est fundus instructus quemadmodum dari*

*debeat, utrum sic ut instructus fuit mortis patrisfamiliae tempore, ut, quae medio tempore adgnata aut in fundum illata sunt, heredis sint*; XLVII. 4. 1 1. § 11 *partus uel fetus post mortem (testatoris) adgnatos*; ib. 2. 1 14. § 15 *non solum in re commodata competit ei cui commodata est furti actio, sed etiam in ea quae ex ea adgnata est*; XXVIII. 3. 1 3. § 1 *Postumi per uirilem sexum descendentes ad similitudinem filiorum nominatim exheredandi sunt, ne testamentum adgnascendo rumpant*; Cic. Or. I. 57. § 241 *Constat adgnascendo rumpi testamentum*. Hence the *agnati*, i.e. members of the family connected through males (Gai. III. 10), were originally those born to a *paterfamilias* and coming thereby under his power. The term was afterwards applied to the connexion of those persons *inter se*, who, if the common ancestor were alive, would be part of his family.

**gregem supplere**] ‘to fill up the flock’. Cf. Paul. Sent. III. 6. § 20 *Gregis usufructu legato, integro manente fetus ad usufructuarium pertinent, saluo eo ut quidquid gregi deperierit ex fetibus impleatur*. *Supplere* is used also below, 1 70. pr. and § 1. D. XXIII. 3. 1 10. § 3 *Fetus dotalium pecorum ad maritum pertinent...sic tamen ut suppleri proprietatem prius oporteat, et summissis in locum mortuorum capitum ex adgnatis residuum in fructum maritus habeat*; XXXVI. 1. 1 46. § 1.

**capitum**] ‘heads’ of single persons, e.g. Gai. III. 8 *non in capita sed stirpes hereditatem diuidi*; of slaves XXI. 2. 1 72; ib. 1. 1 34. § 1; of animals D. VI. 1. 1 1. § 3; 1 2; 1 3; &c.

1 69. **summittere**] ‘to let grow’, ‘rear’. Cf. 1 70 several times; XXIII. 3. 1 10. § 3; XXXVI. 1. 1 60. (58.) § 4. This use of the verb arises from the primitive meaning ‘to send’ or ‘let go’ up; Lucr. I. 8 *Tibi suavis daedala tellus summittit flores*; ib. 193 *Huc accedit uti sine certis imbris anni lactiferos nequeat fetus submittere tellus*; Lucan IV. 411 *Non pabula tellus pascendis submittit equis*. Either in this or the derivative sense the word is used in Hor. Od. IV. 4. 63 *Non Hydra secto corpore firmior creuit, monstrumue submisere Colchi maius*; Sat. II. 4. 63. As growth is usually upwards, the word is frequently and almost technically used of ‘letting things grow’, e.g. Cato R. R. 8. § 1 *Pratum si inrigium erit, si non erit siccum, ne faenum desiet, summittito* (‘leave it for grass’); Varr. R. R. I. 49. § 1 *De pratis summissis, herba cum crescere desiit et aestu arescit, subsecari falcibus debet*; Col. XI. 2. § 27; 3. § 36 *Id cum semel seueris, si non totum radicitus tollas sed alternos frutices in semen submittas, aevo manet*; ib. V. 5. § 17; Arb. 5. § 1 *Tum demum uineam pampinato et duas materias relinquo, alteram quam uitis constituendae causa submittas, alteram subsidio habeas* (i.e. one shoot to make the future vine, another as a reserve in case the first does not come on well); ib. § 2; &c. Hence of the hair of the head, Plin. Ep. VII. 27. § 14 *Reis moris est summittere capillum*; D. XLVII. 10. 1 15. § 27 *si barbam demittat uel capillos submittat*; ib. 1 39; Sen. Polyb. 17. § 36 *modo barbam capillumque summittens*. Hence of rearing animals instead of sending them to the butcher; Varr. R. R. II. 2. § 18 *Castrare oportet agnum non minorem quinque mensium*:



quos arietes submittere uolunt, potissimum eligunt ex matribus quae geminos parere solent; ib. 3. § 8 *In nutricatu haedi trimestres cum sunt facti, tum submittuntur et in grege incipiunt esse*; Colum. vii. 3. § 13 *Post facturam deinde longinquaе regionis opilio fere omnem sobolem pastioni reseruat: suburbanae uillicus enim teneros agnos, dum adhuc herbae sunt expertes, lanio tradit...submitti tamen etiam in uicinia urbis quintum quemque oportebit...nec committi debet, ut totus grex effectus senectute dominum destituat: cum praesertim boni pastoris uel prima cura sit annis omnibus in demortuarum uitiosarumque ouium locum itidem uel etiam plura capita substituere*: iii. 6. § 2; 10. § 17; ib. vii. 9. § 4 (of swine) *Hoc autem fit in longinquis regionibus, ubi nihil nisi submittere expedit: nam suburbanis lactens porcus aere mutandus est*: ib. § 6; Verg. G. iii. 73 of horses quos in spem statues submittere gentis; ib. 159 quos aut pecori malint submittere habendo aut aris seruare sacros; B. i. 45 *Pascite ut ante boues, pueri; summittite tauros* ('rear the bulls', i.e. do not sell them off as if your herds would no longer be safe).

**post substituta ea fiant priora fructuarii]** I have inserted *ea*: *priora* (for *propria*) is Janus a Costa's conjecture approved by Mommsen. My reading is I think quite in accord with that of Stephanus who writes: [ὥς]τε μετὰ τ[ὴν αὐτῶν] ὑποβολ[ὴν] αὐτὰ τὰ ἄχρεια τῆς τοῦ οὐσουφρουκτουαρίου γενή[σονται] δεσποτείας. Mommsen suggests *pro substitutis* for *post substituta*. My reading is simpler and accords better with the Greek. The text of the mss. can hardly be sound: we should have to supply a subject from *defunctorum uel inutilium*, so that 'after the substitution has been made they (viz. the dead or useless cattle) become the property of the fructuary'. *Post substituta ea* is in construction similar to *post acceptum iudicium*, &c. Cf. *Lat. Gr.* § 1407.

**lucro cedat domino]** 'should fall to the profit of the owner'. Cf. Gai. iv. 30 *Sponsionis et restipulationis poena lucro cedit aduersario qui uicerit*; Paul. Sent. ii. 22. § 1 *Fructus fundi dotalis constante matrimonio percepti lucro mariti cedunt*; D. vi. 1. l 35. § 1 *non debere lucro possessoris cedere fructus, cum uictus sit*; xxxi. l 17 *Si quis Titio decem legauerit et rogauerit ut ea restituat Maenio Maeniusque fuerit mortuus, Titii commodo cedit, non heredis*. The double dative in the text and in Gaius is like those in *Lat. Gr.* § 1163. For the use of *cedere*, cf. *solo cedere* Dig. xli. 1. l 9. pr.; *chartis cedere* ib. § 1; *arbor agro cedit* ib. l 26. § 1; &c.

**substituta statim domini fiunt]** The young animals are at first the property of the fructuary, but, on being substituted for the old members of the herd, become at once the property of the owner of the herd, and that without any action or even knowledge on his part. The change of ownership ensues on incorporation with the herd, just as the materials owned by a contractor become by incorporation in a building the property of the owner of the soil (D. vi. 1. l 39. pr.). For *statim*, cf. D. xlvii. 2. l 48. § 6 *Ex furtiuus equis nati statim ad bonae fidei emptorem pertinebunt*.

**priora quoque ex natura fructus, &c.]** 'the former heads', i.e. the

old or useless animals, 'on the substitution of others for them, become the property of the fructuary'. The exact reference of *quoque* is not quite clear. It might be taken to refer to the second and corresponding case of sudden change of ownership without delivery. But it is possible also to connect it with *ex natura fructus*. It was as fruits that the young animals became the property of the usufructuary: and under the same character of fruits the old animals, now as it were pushed off by the younger, cease to be the proprietor's and become the fructuary's.

**nam alioquin]** For in other cases we find things, when first born, becoming the property of the fructuary, and afterwards when substituted for other produce, ceasing to be his. The reference is apparently to the case of trees mentioned above in 1 18. The act of gathering or appropriating by virtue of the position of the fructuary, requires no act of delivery by the proprietor; and the substitution of the new plants or young animals for the old ones is an act of delivery on the part of the fructuary.

**1 70. pr. si non faciat nec suppleat]** Krüger and Mommsen suggest the omission of *nec suppleat*. But the words may be retained if we consider *faciat* equivalent to *summittat* and thus representing an earlier stage in the proceeding to that expressed by *suppleat*. But as Ulpian's sentence at the end of 1. 68 is broken off, we cannot tell what may have intervened in Ulpian between 1. 68 and 1. 70.

**teneri]** 'that he is liable' in an action on the case. Godefroi compares the somewhat analogous cases given in D. XIX. 5. 1 10; 1 12.

**§ 1. quamdiu summittantur]** 'whilst the young are being let grow and the heads which have died are being replaced'. *Quamdiu* sometimes means 'until' (cf. D. VII. 4. 1 15), and that meaning would suit with *suppleantur*. The omission of the subject to *summittantur* is awkward. Perhaps the impersonal *summittatur* was the real reading. *Supplere* was used above in 1 68 in the sense of 'fill up', and so probably at the beginning of this law. Here by an easy transition it means 'replace'. The question raised is this. Some members of the herd die: there is at the time no young animal old enough to put into the herd, but there are some young which, some or all, may in time be fit, but may also die previously or be killed or sold. Whose property are these young? The answer is, till they have grown up and are placed in the herd, they belong whether alive or dead (1 69; 1 7. § 2) to the fructuary, and are at his risk. If and when they are so placed, they belong to the herd-owner. Julian however treats this as a case of property in suspense, and, if this be so, the property is not decided until some act on the fructuary's part, e.g. sending the lamb to the butcher, or putting it in the herd, fixes the animal's lot. Meantime if the animal is stolen, neither fructuary nor owner can bring a *condictio furtiva* (1 12. § 5), and, if the animal is slain and eaten, is the thief to be always unpunished because the decisive act cannot now be taken? If the usufruct come to an end, while there are still young animals in this proba-

tionary state, who is to claim them? I presume the fructuary's heir would, because they have not yet been incorporated into the herd. (But cf. l 25. § 1.) And in the same way if they are stolen, the fructuary could bring the *condictio* because they have not yet been incorporated. I doubt whether Julian, whose view is approved by Ulpian, really meant that the property was for the time ownerless, absolutely *in pendenti*, and not that it was not finally decided. It is better to interpret his words in a sense quite suitable to the notion of *pendens dominium*, but suitable also to the practical necessities of the position. *Pendens* is properly applied to property vested in an owner for the time, though it may be liable on the occurrence of an event to be divested in favour of another. This view makes Julian's statement consistent with Pomponius in l 69 and with l 70. § 2. Wächter (*Pand.* I. § 69, p. 344) holds that in this single case of animals born when the herd is not full, there is still (in Germany) such a thing as property in suspense, but that all other alleged cases have become impractical, and that even in this the practice of German courts does not recognise it. Vangerow *Pand.* § 301 also allows it (as well as some others).

§ 2. **carnem fetus, &c.**] The young when alive was the property of the fructuary, not merely the object of a usufruct: it was his as produce of the herd: hence the carcase belongs to him also. In D. VII. 4. l 30 we have a different case, *caro et corium mortui pecoris in fructu non est, quia mortuo eo ususfructus extinguitur*, i.e. a usufruct in a herd of cattle does not carry with it a right to the carcase. The fructuary has no power of consumption of the objects of his usufruct.

§ 3. **gregis uel armenti uel equitii**] *Grex* is a general term; *armen-tum* applies to plough beasts; *equitium* is a stud of horses: cf. l 68. § 2.

**uniuersitatis**] 'of the whole' or 'collective unity'. The commonest instances of such wholes are a flock, as here, cf. D. XXX. l 22; a house (D. XLI. l 17. § 11), an inheritance (Gai. II. 97 sqq.). On the different kinds of *corpora* (or *uniuersitates*) see D. XLI. 3. l 30. pr.

**nihil supplebit**] i.e. he will not be bound to supply anything. If an individual animal or thing is left him in usufruct, the fructuary can use it in a proper way, and, if it die, he loses his usufruct but is in no way bound to replace it. If a herd is left him, he has to keep the herd in good condition and thus to keep up its numbers out of its own produce. But if some pestilence were to destroy the herd, the fructuary would not be bound to purchase others to keep up the herd. His only obligation is to deal with the herd as a good man of business, and not to take of its fruits, i.e. the young, so thoughtlessly or greedily as to prevent or endanger the continuance of the herd.

§ 4. The case put in this section is this: The herd is full in number, and young are born: there is no obligation resting on the fructuary, and the young are his property. Some vacancies occur in the herd. Does the occurrence of these vacancies put a present obligation on the fructuary, so that he ought at once to put some of the young definitely into the herd;



or may the fructuary still deal with these as he likes, and supply the vacancies only out of subsequent births? Ulpian answers apparently that the duty of supplying the vacancies arises when the vacancies occur, but that this does not affect the right of property already acquired by the fructuary in the former produce. Eventually if the vacancies be not supplied, he will be liable in damages. But presumably he is not bound always to supply the vacancies, however unexpected, at once, nor consequently is he bound to have a stock ready for the purpose larger than the average deficiencies which may be expected. The obligation with this class of property, as with all, is to act as a *bonus paterfamilias*, i.e. as a prudent man of business.

**est]** So the inferior mss., and the reading is approved by Mommsen. The Florentine has *et*: but *est* forms a better antithesis to *nihil fuit*.

**nocere debere]** is a vague phrase, meaning apparently that the fructuary is liable.

§ 5. **summittere facti est]** 'what is rearing is a question of fact' (not of intention, cf. D. xxix. 2. l 20. pr. &c.), i.e. the judge has nothing to do with mere intention. He has to ascertain from the actual dealing with the herd whether certain head of cattle have or have not been *summissa*. Julian says that rearing implies a separation of some kind—apparently so as to show that this or that animal is destined not for the butcher, but for keeping up the stock, and consequently is no longer the property of the fructuary, but of the proprietary. What distinction is intended between *dispertire*, *dividere* and *divisionem facere* I cannot tell. Probably a variety of expressions were used by Julian to show that there was no specific mode of separation required, but only a separation of some kind which showed the farmer's purpose actually carried into effect.

**quo]** So Mommsen suggests. The mss. have *quod*, which is ambiguous and not so appropriate as *quo*; 'by which act of division the property in the animals let grow will come to the proprietor'.

1 71. Change in the specific form of a thing caused the extinction of the usufruct (*Rei mutatione interire usumfructum placet* D. vii. 4. l 5. § 2). But this is absolutely true, only if the change was really the destruction of the thing. The usufruct of a house is gone if the house is pulled down; and even the rebuilding of the house in the same form would not revive the usufruct (ib. l 10. § 1; Paul. *Sent.* iii. 6. § 31). The usufruct of cups is gone, if the cups are melted into a mass of metal: and cups remade from the same metal will not be subject to the old usufruct (above l 36. pr.). But a vacant piece of ground is no longer vacant indeed, if a house is built on it, and therefore the usufruct is lost; but if the house is pulled down and the ground again becomes vacant, it is the same ground vacant, and the usufruct revives (cf. D. vii. 4. l 23; l 24). But a usufruct may perish by non-user; and therefore if the building continued long enough for the non-user of the vacant ground to become fatal, the usufruct is dead and will not revive on the subsequent removal of the building. Of course the

usufructuary will have his remedy according to circumstances by an action against the person who by building has thus frustrated his enjoyment of the usufruct (D. VII. 4. 15. § 3—17). The proprietor indeed may obviate this action by granting the usufruct anew (ib. 17).

**superficie]** The superficies ('what is above the face of the land') was the building as distinguished from the site. Cf. Cic. *Att.* IV. 1. § 7 *De domo nostra nihil adhuc pontifices responderunt: qui si sustulerint religionem, aream praeclaram habebimus, superficiem consules ex senatus consulto aestimabunt*; ib. 2. § 5 *nobis superficiem aedium consules de consilii sententia aestimarunt sestertio uicies*; Colum. I. 5. § 9; Javol. D. XLI. 3. 1 23. pr. *aedes ex duabus rebus constant, ex solo et superficie*; Gai. II. 73 *Id quod in solo nostro ab aliquo aedificatum est, quamvis ille suo nomine aedificauerit, iure naturali nostrum fit, quia superficies solo cedit*.

172. **accesserit]** sc. *ususfructus proprietati*.

**plus admittit Maec.]** Ulpian leaves this point undecided. Bas. adopts Maecianus' view, which must have been approved by Justinian, who allowed its expression without note of disapproval.

**utiliter diem cedere]** 'that it is validly vested'. For this use of *utiliter* cf. D. XXVIII. 5. 1 49. (48.) § 2 *interdum nec cum libertate utiliter servus a domina heres instituitur*; ib. 1 90 (89); XXXVII. 11. 1 6. On *diem cedere* see above on 1 27. pr. p. 178. 'The usufruct would not vest in the legatee until its present holder lost it. If, when that happened, the legatee was not alive, it would be merged in the propriety'.

**pertinere]** sc. *usumfructum*.

173. Covering the area with building or putting a regular house on it would be a change of the area and forfeit the usufruct, or at least make the usufructuary liable to the proprietor. Paul. *Sent.* III. 6. § 21 *areae usufructu legato aedificia in ea constitui non possunt*. But the text sanctions the mere erection of a hut or cottage for the better guard of the property on the area. A similarly slight erection (*casa*) was allowed on a public beach (D. I. 8. 1 5. § 1).

**posse]** We must understand *puto*, or *dicendum est* or the like. The compilers have cut away the governing word.

174. Each slave acquires for his master; and when two persons are legatees in common, if no shares are specified, they take equally.

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